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Supreme Court, U.S.
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No. 03-1574

In The Supreme Court of the United States

BOBBY JOE WINCE, in his individual capacity;
JOHN DOLAN, in his individual capacity; and
THOMAS DUSING, in his individual capacity,

Petitioners,

v.

SUSAN STEMLER, WILLIAM CHIPMAN,
Administrator of the Estate of CONNI BLACK, and
RANDY BLACK, Legal Guardian of Shianne Black,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The Application of the *Rooker-Feldman* Doctrine

In order to determine the applicability of the *Rooker-Feldman* doctrine to the substantive due process claim of Plaintiff-Respondent Chipman, the Court must differentiate between the two factual scenarios which informed the respective federal and state court decisions at issue. The first scenario occurred when the Petitioner police officers forced the decedent, Conni Black, into the vehicle of an obviously drunk driver, known by the police to have just previously assaulted and terrorized Black and her companion, Susan Stemler. This is the "police stop" scenario which led the Sixth Circuit to acknowledge the validity of Respondent's substantive due process claim. The second scenario occurred some short time thereafter when the vehicle into which Black had been forced by threat of arrest collided with a guardrail along the interstate highway. Because Black sustained fatal injuries in this collision, it gave rise to Respondent's state law wrongful death claim.

The Kentucky Supreme Court affirmed the summary judgment dismissal of this claim on the sole basis that decedent was not in police custody *at the time of the fatal accident*. The question, then, is whether the Sixth Circuit properly declined to apply the *Rooker-Feldman* doctrine by finding that the state wrongful death claim (with its necessary focus on the immediate cause of the collision) is not "inextricably intertwined" with the Respondent's substantive due process claim (with its necessary focus on the issue of police custody during the investigative traffic stop).

QUESTIONS PRESENTED FOR REVIEW – Continued

2. The Application of Claim Preclusion

Plaintiff-Respondent Chipman filed parallel simultaneous suits in state and federal court asserting, in the respective courts, a wrongful death claim and a substantive due process claim under 42 U.S.C. § 1983. Plaintiff-Respondent Stemler filed her two surviving claims, excessive force and fabrication of evidence, in federal court only. The issue for Chipman's and Stemler's federal claims is whether Kentucky's transactional rule for claim-splitting is applicable or not and, if it is not applicable, whether the Sixth Circuit correctly concluded that the appropriate inquiry under the Kentucky law of claim preclusion is the identity or lack of identity of the state and federal causes of action.

Application of both doctrines, *Rooker-Feldman* and Claim Preclusion, involves a fairly detailed examination of the underlying facts, as well as the complex procedural history of this litigation. Though essential to a proper application of these doctrines, no such examination appears in the Petition. Such a review follows.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Susan Stemler, William Chipman as Administrator of the Estate of Conni Black, and Randy Black as Legal Guardian of Shianne Black oppose the Petition for a Writ of Certiorari filed by Bobby Joe Wince, Thomas Dusing and John Dolan on the basis that Petitioners primarily seek to clarify a procedural/jurisdictional rule, the *Rooker-Feldman* doctrine, which is wholly foreign to the dispositive issues of this case. Likewise, Petitioners' assertion that the Sixth Circuit misapplied the Kentucky law of claim preclusion by not applying the transactional rule cannot withstand a careful review of that settled case law. Nevertheless, when applying the transactional rule (for the sake of argument only) or when applying the applicable claim preclusion standard, Respondents' substantive due process, excessive force and fabrication of evidence claims are not barred by res judicata.

STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS

The following recitation of facts borrows heavily from the Sixth Circuit's statement of facts in *Stemler v. City of Florence*, 126 F.3d 856 (CA6 1997). A copy of that opinion is attached hereto as Appendix 1. The Sixth Circuit, understandably appalled at Petitioners' conduct leading to the death of Respondent Chipman's daughter, Conni Black, offered this terse summary of the facts:

> The very notion that police officers should not have known that they could not [at the time of the police stop] force an incapacitated woman to drive off with an obviously drunk man who they had reason to believe had beaten her betrays a chilling and unacceptable vision of the role of the police in our society.

Id. at 870.

On February 18, 1994, Conni Black and her former boyfriend, Steve Kritis, had been drinking excessively at a local bar. An altercation arose between Black and Kritis during which Kritis forcefully struck Black a number of times and then later struck Black's friend, Susan Stemler. In the circumstances, Black asked Stemler to drive her home. Kritis immediately pursued the two women in his truck with his headlights kept off and at one point in the pursuit rear-ended Stemler's car in an attempt to make her stop.[1]

A witness to the chase (Terry Barker) observed that the women were in obvious distress. He reported that Kritis, at a high rate of speed, pulled ahead of Stemler's car, forcing her down a residential cul-de-sac. When Stemler pulled her car into a driveway, Kritis pulled behind to block her in. At this time, a retired police officer (William Minnick) was awakened by the noise. He then saw Kritis standing in his driveway on the passenger (Conni Black's) side of the car hitting the car window and yelling. Stemler then maneuvered around Kritis' truck and drove up the street, but Kritis jumped in his truck and again gave chase. According to Barker, Kritis was driving about 60 miles per hour on the sidewalk of the residential street. After calling 911, Minnick got in his car and followed Kritis and Stemler to the main highway at the top of his street.

1. The Police Stop

After the vehicles pulled back onto the main street, they stopped at a red light. At this time, Barker flashed his lights to alert a nearby police officer, Defendant-Petitioner Thomas Dusing, who was responding to the 911 call. When Dusing pulled up to Barker, Barker informed

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[1] These facts are being culled from the Sixth Circuit's recitation of the deposition testimony of various witnesses as reported in the opinion at 126 F.3d 856. (Appendix 1)

him that there was a "serious problem" with the two vehicles ahead of him and that Kritis appeared to be a threat to the safety of the two women. Dusing then pulled his cruiser in front of Stemler's car and Kritis' truck. Stemler told Dusing that Kritis was drunk, that he had assaulted both her and Black, that he had threatened to kill her, and that he had placed both of them in danger by chasing after them at high speed.

Another police officer approached Kritis, who told the officer that Stemler was a lesbian who was kidnapping his girlfriend. Witnesses say that the officers and deputies at the scene repeated to each other and to others present Kritis' assertion that Stemler was a lesbian. Kritis was never tested for intoxication or even asked to step out of the truck, even though Dusing was told by another police officer that Kritis smelled of alcohol. Subsequent observers would also testify that, shortly after the police stop, it was unmistakably apparent that Kritis was very drunk.

Dusing ordered an officer to approach Black, who was still in the passenger seat of Stemler's car, to advise her that she would be arrested for public intoxication "if she didn't want to leave with the male." Two officers then lifted her out of the car and walked her back to Kritis' truck, with Black stumbling as she made her way. One officer then physically placed her into the passenger seat of the truck.

2. The Fatal Accident

As soon as Black was in the truck, Kritis drove away. By Kritis' account, Black passed out, but then woke up and began to hit him. While striking her back, Kritis lost control of the truck, which swerved and collided into the guardrail. Black was partially ejected from the passenger-side window. Her arm was severed from her body and the top of her skull was severed off by the guardrail, but Kritis continued driving for several miles before stopping. Black died immediately upon impact with the guardrail.

Police officers not involved in the earlier police stop arrived at the location where Kritis had stopped (responding to a 911 call by an individual on the scene). It was so apparent to these officers that Kritis was drunk that they did not even need to conduct a field sobriety test to determine that there was probable cause to arrest Kritis for driving under the influence.

Based upon these facts, the Sixth Circuit in *Stemler* concluded that witness testimony clearly supported a claim that the police officers acted at the police stop with deliberate indifference to the threat of injury to Black:

> [The officers] knew, or reasonably should have known, that Kritis was unfit to drive. They knew, or reasonably should have known, that Kritis had assaulted [Black] earlier in the evening and had threatened to hurt her. Nevertheless, they chose to act affirmatively to place her in harm's way.

126 F.3d at 870.

3. Stemler's Prosecution

After arresting Stemler, Officer Wince took her for a blood test.[2] Stemler related that she had drunk a half-glass of beer and two Irish coffees over the course of the night. She concluded that the officers must have tampered with her blood sample, which allegedly revealed a .17 blood alcohol level an hour after a breathalyzer test supposedly registered a .105 blood alcohol level. Wince handled her blood sample after he learned that Black had died. A forensic scientist reviewed the specimens and the timing of the tests and concluded that the sample's integrity had been destroyed, given that Wince waited five days to deliver the sample and that there were no procedures to

[2] As with the above facts, the Stemler prosecution facts are being taken from the Sixth Circuit's recitation of the deposition testimony as reported in the opinion at 126 F.3d 856. (Appendix 1)

guard against tampering. When a blood sample is submitted to the detective's office of the Florence Police Department, the clerk of that office is supposed to receive a property card and an evidence tag; the clerk never received either in this case in violation of department policy. Stemler's sample was the only sample that Wince had ever kept in the Florence Police Department refrigerator for five days in his career and was also the only sample that he had ever personally driven to the lab. According to Officer Chester Snow, who supervised the property room, it was "highly irregular" to keep a sample in the refrigerator for five days.

Stemler was prosecuted in the Boone County District Court for drunken driving. She defended the charge on the ground that the evidence against her had been fabricated. Dr. Gordon James testified at her trial that the handling of the blood sample was "arbitrary" and that the chain of custody had not been established. After her first trial resulted in a hung jury, Boone County prosecutors determined to retry her. Although Wince claimed at Stemler's first DUI trial that he had not completed an evidence card, at the retrial he produced a completed card which neither the Florence Police Department clerk nor Snow had ever seen. He claimed that he had completed the card on February 9, at the time of the arrest; but the clerk testified that if that were true, she should have seen the card. The second jury acquitted Stemler. As stated above, although Stemler was twice tried for DUI and acquitted, Petitioners did not even conduct a field sobriety test on Kritis.

B. PROCEEDINGS BELOW

1. State Court Proceedings

a. Chipman's Claims

On March 7, 1994, William Chipman, the administrator of the estate of Conni Black, filed a wrongful death action in the Boone Circuit Court against Florence police

officers, Boone County deputies, the City of Florence and the Boone County Sheriff. The Boone Circuit Court entered summary judgment on behalf of the defendants on Chipman's wrongful death claim. *Chipman v. City of Florence*, No. 94-CI-00202 slip op. at 4 (Boone Co., Ky., Cir. Ct Apr. 2, 1996). The Kentucky Court of Appeals reversed the Boone Circuit Court. *Chipman v. City of Florence*, No. 1996-CA-001287-MR (Ky.Ct.App. Nov. 25, 1998). The Kentucky Supreme Court reversed and reinstated the summary judgment in favor of defendants. *City of Florence v. Chipman*, 38 S.W.3d 387 (Ky. 2001).

The Kentucky Supreme Court reasoned that there was no "special relationship" between Black and the officers, **when the pickup truck struck the guardrail**, to support a wrongful death claim. *Id.* at 392. The Court determined that no "special relationship" existed because Black was not in custody "at the time the injury producing act occurred," which the Kentucky Supreme Court held to be the time the truck struck the guardrail. *Id.* More specifically, the Court held:

> There is no evidence from which it can be ascertained that Black was in state custody or otherwise restrained by the police at the time the pickup truck struck the guardrail with the fatal result. In addition, there is no evidence to support a claim that the conduct which caused the pickup truck to leave the roadway and strike the guardrail was the result of the actions of the police officers.

Id. at 392. The Kentucky Supreme Court's decision was rooted in the absence of a special relationship **at the time the truck struck the guardrail**.

b. Stemler's Claims

Susan Stemler brought claims of malicious prosecution, false arrest, abuse of process, assault and battery, false imprisonment and negligent or intentional infliction of emotional distress. *Stemler v. Florence,* Boone Circuit

Court, No. 94-CI-00459. The state trial court granted summary judgment in favor of the defendants on all claims except Stemler's assault and battery claim against Wince, which Stemler voluntarily dismissed so that an appeal could proceed. The Kentucky Court of Appeals affirmed the decision of the trial court. Stemler did not seek further appeal in state court on these claims.

2. Federal Court Proceedings

a. Chipman's Claims

On March 31, 1994, three weeks after filing the wrongful death action in state court, Chipman also filed a complaint in federal court against the same defendants. The complaint alleged that the defendants were liable under 42 U.S.C. § 1983 because they had displayed deliberate indifference to the welfare of Conni Black by failing to arrest Kritis and putting Black into his truck. The district court granted the officers' motions to dismiss under Rule 12(b)(6) of the FRCP on the grounds of qualified immunity. The district court also granted the motions for summary judgment of Florence and Boone County. *Chipman v. City of Florence*, 858 F. Supp. 87 (E.D. Ky. 1994), reconsideration denied on amended complaint, 866 F. Supp. 332 (E.D. Ky. 1994).

On October 8, 1997, the Sixth Circuit upheld the district court's order granting summary judgment to the governmental defendants, Florence and Boone County. *Stemler*, 126 F.3d at 866. (*See* Appendix 1). However, the Sixth Circuit reversed the district court's dismissal of the claims against the individual officers, holding that there were sufficient grounds to maintain a § 1983 claim against the individual officers. *Id.* at 870. The only state court decision prior to the Sixth Circuit's decision was the state trial court's decision awarding summary judgment to the defendant officers on the basis that Black was not in custody when the pickup struck the guardrail and that the conduct of the state actors was not the direct cause of the

fatal accident (the same rationale subsequently adopted by the state Supreme Court). The Sixth Circuit noted the state trial court's opinion and commented that "[w]hile these findings are entitled to preclusive effect, they are irrelevant to the merits of her substantive due process claim." *Stemler*, 126 F.3d at 870, n.12. The Sixth Circuit remanded the case to the district court for further proceedings.

On remand, the district court held the case in abeyance pending a decision by the Kentucky Supreme Court on the appeal from the Boone Circuit Court's entry of summary judgment in favor of defendants and the Kentucky Court of Appeals' reversal of that order, issued February 22, 2001. Chipman later reached a settlement with the Boone County officers. In June 2001, the federal district court granted the officers' motion for summary judgment on Chipman's substantive due process claim. Relying on the doctrine of issue preclusion (and ignoring the Sixth Circuit's fn.12 cited above), the district court concluded that the Kentucky Supreme Court's decision foreclosed Chipman's substantive due process claim.

The Sixth Circuit reversed, holding that a § 1983 claim requires a showing that the state actors and the plaintiff had a sufficiently direct relationship such that the state actors owed Conni Black a duty not to subject her to probable harm. *Stemler v. City of Florence*, 350 F.3d 578, 586 (CA6 2003). The relevant issue was whether Black was in custody during the police stop. The Sixth Circuit held that the two distinct federal and state causes of action and the separate factual issues related to those diverse claims were sufficiently distinguishable to preclude the application of both res judicata and the *Rooker-Feldman* doctrine. *Id.* at 588-89.

b. Stemler's Claims

Stemler filed a § 1983 action against the officers and the City of Florence. The district court granted the officers' Rule 12(b)(6) motions to dismiss on the basis of qualified

immunity. The district court then consolidated her remaining case with Chipman's and awarded summary judgment to Florence. A voluntary dismissal was entered pursuant to an agreement between the parties to dismiss the claim so that an appeal could proceed. The agreement allowed her to bring her claim again should she be successful upon appeal. The Sixth Circuit affirmed the grant of summary judgment in favor of the City of Florence. *Stemler*, 126 F.3d at 866.

Stemler amended her complaint to allege that an officer fabricated blood sample evidence used in her DUI trials and reasserted her excessive force claim. The district court held the case in abeyance pending final judgments in the state court proceedings. The district court denied the officers' motion for summary judgment. In its more recent opinion, the Sixth Circuit reversed the denial of summary judgment on Stemler's equal protection claim (barred by issue preclusion), but affirmed the denial of summary judgment on her excessive force claim and fabrication of evidence claim, her two sole surviving claims. The Sixth Circuit held as follows:

> Wince also argues that claim preclusion would bar Stemler from bringing these claims in federal court, because as [sic] she could have brought them in state court. However, as discussed above, the Kentucky law of claim preclusion only bars bringing the *same* cause of action twice. Stemler's claims for falsification of evidence and excessive force could have been brought in state court and were not. However, under Kentucky law, as she did not bring identical causes of action in state court, she is not barred from bringing them in federal court. *Yeoman*, 983 S.W.2d at 465. The district court did not err when it decided that claim preclusion did not apply to these claims.

Stemler, 350 F.3d at 592. The instant Petition does not contend that Stemler's claims are barred by the *Rooker-Feldman* doctrine.

RESPONDENTS' ARGUMENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I. SINCE THE SIXTH CIRCUIT'S OPINION DID NOT IN EFFECT OVERRULE THE STATE COURT'S OPINION, THE *ROOKER-FELDMAN* DOCTRINE IS INAPPLICABLE TO THIS CASE.

The *Rooker-Feldman* doctrine prohibits federal courts other than the United States Supreme Court from reviewing state court proceedings to adjudicate federal claims which are "inextricably intertwined" with issues decided in state court proceedings. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Rooker*, the Supreme Court held that the power to hear appeals from state court judgments is exclusively held by the United States Supreme Court. *Id.* at 415-16. *Feldman* held that lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate claims "inextricably intertwined" with issues decided in state court proceedings. 460 U.S. at 483.

The jurisdictional analysis thus hinges upon the meaning of "inextricably intertwined," which Justice Marshall defined as follows:

> While the question of whether a federal constitutional challenge is inextricably intertwined with the merits of a state-court judgment may sometimes be difficult to answer, it is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Pennzoil Company v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring). The Sixth Circuit's formulation of the doctrine is consistent with this Court's:

> The federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Peterson Novelties, Inc. v. City of Berkley, 305 F.3d 386, 391 (CA6 2002) Thus, a federal claim is "inextricably intertwined" only if federal relief must be predicated upon a conviction that the state court was wrong.

In applying this doctrine to the present case, the precise issue is whether the Sixth Circuit's holding that Black was in police custody at the time of the police stop for purposes of Respondent's § 1983 action was a *de facto* reversal of the state court's dismissal of Respondent's wrongful death action. As stated above, the Kentucky Supreme Court emphatically held that the basis for affirming the summary judgment dismissal of the wrongful death claim was that there was no special relationship between Black and the officers at the time Kritis' truck struck the guardrail. Thus, as stated in the Sixth Circuit's opinion, federal relief most certainly can be granted in this case without overruling the Kentucky Supreme Court's holding. *Stemler*, 350 F.3d at 588-89. In their respective opinions, both the Kentucky Supreme Court and the Sixth Circuit expressly recognized that each was deciding the case before it on a separate set of facts: the collision facts being dispositive of the state claim and the police stop facts of the federal claim.

Any finding by the federal court that Black was in custody during the traffic stop would not implicitly require

a conclusion that the state court improperly decided ***the issues before it.*** As stated by the Sixth Circuit:

> The Kentucky Supreme Court's discussion of whether Black was ever in custody was dicta, and therefore any finding by the federal court that Black was in custody at some point during the encounter would not implicitly hold that the state court improperly decided *the issues before it*. The issue of Black's custody before the truck hit the guardrail was not an issue that was salient before the Kentucky court.

Stemler, 350 F.3d at 589.

While the Kentucky Supreme Court stated that there was no evidence in the record to support a finding that Black was "ever" in custody, ***the Kentucky Supreme Court's statement that Black was never in custody was not necessary to its judgment.*** The Kentucky Supreme Court's statement was pure *dictum*, and was implicitly recognized as such by the court's own opinion. The Kentucky Supreme Court specifically stated its ***holding*** as follows: "There is no evidence in the record from which it can be concluded that Black was in custody by the police or any state actor at the time the pickup truck struck the guardrail." *City of Florence*, 38 S.W.3d at 392.

As discussed earlier, application of the *Rooker-Feldman* doctrine requires only a consideration of whether the federal court must re-review issues that "actually arose" in the state court, or whether the state court wrongly decided "the issues before it." *Rooker*, 263 U.S. at 415-16; *Pennzoil*, 481 U.S. at 29; *see also Holloway v. Brush*, 220 F.3d 767, 778-779 (CA6 2000) (refusing to apply *Rooker-Feldman* where clear conceptual distinction existed between the state court holding and the issue before the federal court); *Peterson Novelties*, 305 F.3d at 392-93 (holding "[t]he state court certainly *could* have found the City in violation of its May 9 order, and it declined the opportunity to do so"; consequently, "it would

therefore be entirely possible for the district court in this case to provide Peterson federal relief not predicated upon a conviction that the state court was wrong, and for that reason the Rooker-Feldman doctrine does not preclude the court's adjudication"). Adhering to this Court's clear enunciation of the *Rooker-Feldman* doctrine, the Sixth Circuit did not in effect reverse the state court's opinion that there was no "special relationship" between Black and the police at the time of her fatal collision.

II. SINCE NEITHER A BROAD NOR A NARROW INTERPRETATION OF THE *ROOKER-FELDMAN* DOCTRINE IS APPLICABLE TO THIS CASE, IT IS UNSUITABLE FOR CLARIFYING THAT DOCTRINE.

Petitioners place great emphasis upon their argument that the lower federal courts are inconsistently applying the *Rooker-Feldman* doctrine. Petitioners claim that application of the "inextricably intertwined" test varies in the lower courts due to the Supreme Court's lack of guidance. Petitioners press this claim even though they acknowledge that the recent *Pennzoil* opinion clearly defined a federal claim to be "inextricably intertwined" where "the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." Petition for Writ of Certiorari, p. 9. Petitioners cite case law from varying circuits to illustrate their argument. When the "contradictory" cases cited by Petitioners are closely examined, it is clear that no contradiction exists. Moreover, the particular case at hand cannot serve to clarify the *Rooker-Feldman* doctrine because *Rooker-Feldman* is inapplicable under *any* interpretation of the doctrine by the lower courts.

Petitioners' analysis fails to acknowledge that the application of "inextricably intertwined" is unavoidably fact-intensive. The application of the rule is dependent upon the specific claims, the exact issues and the precise

facts confronting each state and federal court. For example, Petitioners compare *Stern v. Nix*, 840 F.2d 208 (CA3 1988) with *Centifanti v. Nix*, 865 F.2d 1422 (CA3 1989) and *Razatos v. Colorado Supreme Court*, 746 F.2d 1429 (CA10 1984), in support of their argument that *Rooker-Feldman* is applied inconsistently. Yet these cases have no relevance to the case *sub judice* because they merely involve the issue whether a constitutional challenge is general or connected to a particular case. This element of *Rooker-Feldman* is not at issue in the case at hand.

In fact, these cases show that *Rooker-Feldman* is applied consistently. The cases apply the exact same rule of law, but have different holdings due to significant variations in the facts being treated. The *Centifanti* court specifically distinguished its holding in *Stern* based upon the differences in the relief requested. *Stern* also specifically distinguished *Razatos* on the basis of the differing type of relief requested. The courts consistently applied the same *Rooker-Feldman* standard, but came to different conclusions based on the effect of the different remedies requested by the plaintiffs. Thus, Petitioners' citation to these cases, upon a closer look, serves only to illustrate that the lower courts consistently apply the same standard.

Petitioners also claim that the circuits are split in that some apply a "narrow" interpretation of *Rooker-Feldman* while others apply a "broad" interpretation. With regard to the case at hand, this is a distinction without a difference. Regardless of how broad or narrow *Rooker-Feldman* is applied, the federal claim in the case *sub judice* can be decided, and was decided, without impugning the soundness of the state court's decision.

For example, Petitioners cite *Moccio v. N.Y. State Office of Ct. Adm.*, 95 F.3d 195 (CA2 1996) as illustrative of the so-called "broad" interpretation. *Moccio* merely notes the occasional overlap of *Rooker-Feldman* with res judicata, and applies the local res judicata standard to determine if *Rooker-Feldman* applies. By that standard,

the question was whether the federal claim was "actually and necessarily decided in a prior proceeding." *Id.* at 200. Applying this res judicata standard to the case at hand does not change the outcome. Thus Chipman's § 1983 claim is not barred by the *Rooker-Feldman* doctrine because the custody issue before the federal court was not "actually and necessarily decided" by the Kentucky Supreme Court (as noted in the Sixth Circuit's opinion itself).

On the other hand, Petitioners cite *Kougasian v. TMSL, Inc.*, 359 F.3d 1136 (CA9 2004) as applying a "narrow" interpretation of *Rooker-Feldman*:

> In this case, Kougasian has asserted no legal error by the state court. She is therefore not bringing a de facto appeal under Rooker-Feldman. Because she is not bringing a forbidden de facto appeal, there are no issues with which the issues in her federal claims are "inextricably intertwined" within the meaning of Rooker-Feldman. Therefore, even though Kougasian's remaining four causes of actions are essentially identical to the causes of action already adjudicated in Kougasian I and/or II, Rooker-Feldman does not bar Kougasian's federal suit on those causes of action.

Id. at 1143. Similarly, Chipman has not asserted legal error by the Kentucky Supreme Court. The Kentucky Supreme Court's *ratio decidendi* is unrelated to the issue which the Sixth Circuit was called upon to decide. Thus, using this "narrow" construction of *Rooker-Feldman*, it is likewise inapplicable. Respondent Chipman's claim is simply not an appropriate vehicle for redefining *Rooker-Feldman*.

III. PRIOR CASE LAW FROM THIS COURT PLAINLY PERMITTED RESPONDENTS TO FILE SIMULTANEOUS PARALLEL CLAIMS IN STATE AND FEDERAL COURT.

Petitioners argue that "[t]he Sixth Circuit's refusal to apply the Rooker-Feldman doctrine is an open invitation for parties to split their causes of action between state and federal courts, in derogation of well-established public policies." Petition for Writ of Certiorari, p. 13. Petitioners' argument, in other words, is that the *Rooker-Feldman* doctrine in effect outlaws the simultaneous litigation of parallel state and federal claims. The scant authority for this proposition cited in the Petition is readily distinguishable.

Although *Rooker-Feldman* does prohibit *de facto* appeals in federal district courts from state court judgments, it is certainly not an across-the-board prohibition of tandem litigation in state and federal courts. In fact, parallel state and federal litigation is "one of the hallmarks of our federal system." *Kougasian v. TMSL*, 359 F.3d 1136, 1143 (CA9 2004). Similarly, in *Atlantic C.L.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), this Court held:.

> Although the federal court did have jurisdiction of the railroad's complaint based on federal law, the state court also had jurisdiction over the complaint based on state law and the union's asserted federal defense as well. While the railroad could probably have based its federal case on the pendent state law claims as well, it was free to refrain from doing so and leave the state law questions and the related issue concerning preclusion of state remedies by federal law to the state courts. Conversely, although it could have tendered its federal claims to the state court, it was also free to restrict the state complaint to state grounds alone. In short, the state and federal courts had concurrent jurisdiction in this

> case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.

Id. at 295. There is no outright bar to parallel or related lawsuits in state and federal courts as Petitioners claim. *See, e.g., Princess Lida of Thurn & Taxis v. Thompson,* 305 U.S. 456, 466 (1939). Generally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction. . . ." *Colorado River Water Conservation District No. 7 v. United States*, 424 U.S. 800, 817 (1976).

Support for this flexible policy lies in numerous doctrines that this Court has established regarding federalism and its impact on state court proceedings. Many safeguards exist to allow simultaneous state and federal actions while protecting against infringement on state rights by federal courts. To name only a few, the Younger doctrine, the Pullman doctrine, the England Reservation, pendency of actions and the principles of res judicata permit simultaneous federal and state court filings while protecting states' rights against federal encroachment. The England Reservation, for example, permits a plaintiff who goes to state court for a ruling on the state law question to preserve the right, either expressly or by implication, to litigate federal claims in federal court. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). Commenting on *England*, the Sixth Circuit thus noted:

> We realize that a party who is allowed to proceed in both federal and state forums may enjoy two bites of the apple. However, two safeguards exist. First, to the extent that a plaintiff does more than protect his rights under state law by fully litigating federal claims, *England* bars relitigation of those claims. Second, if a plaintiff attempts to split a cause of action between federal

> and state courts where abstention is inappropriate, the federal court may accord full preclusive effect to a prior state decision.

Wicker v. Board of Education of Knott County, 826 F.2d 442, 446 (CA6 1987).[3] Indeed, the *Rooker-Feldman* doctrine itself permits tandem federal and state court proceedings as long as the federal court does not sit in review of the state court's decision.

Respondent Chipman filed parallel complaints, one in state court and one in federal court, alleging separate claims for relief. Whereas Respondent asserted his wrongful death claim in state court, he properly asserted the § 1983 civil rights claim in federal court in accordance with 28 U.S.C. § 1331. While Respondents Chipman and Stemler could have brought all claims in one court, Respondents were not ***required*** to do so. Petitioners' assertion of a blanket prohibition against simultaneous suits in federal and state courts is totally at odds with the case law developed by this Court.

IV. THE SIXTH CIRCUIT CORRECTLY APPLIED KENTUCKY LAW IN REJECTING PETITIONERS' CLAIM PRECLUSION ARGUMENT.

Petitioners contend that the Sixth Circuit misapplied Kentucky law that defines "the same cause of action" element of the claim preclusion doctrine. Petitioners argue that this Court should apply a "transactional rule" to determine if the causes of action are the same for purposes

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[3] In their state court proceedings, Chipman and Stemler did not attempt to fully litigate their federal claims and, as discussed more fully below, they did not split a single cause of action as that concept is defined in settled Kentucky case law. In this latter regard, see especially *Watts v. K, S & H*, 957 S.W.2d 233 (Ky. 1997), discussed below, where the Kentucky Supreme Court permitted separate negligence actions against the drunk driver who injured plaintiff and the vendor who sold liquor to the drunk driver.

of claim preclusion. Petitioners' argument is misplaced, as the transactional approach applies only to a subsidiary principle of res judicata known as "splitting the cause of action." Since Respondents did not split a single cause of action, this subsidiary rule does not come into play. Nevertheless, even under the transactional analysis, Respondents' claims are not barred. The governing principle, therefore (as the Sixth Circuit noted), is found in *Yeoman v. Kentucky Health Policy Board*, 983 S.W.2d 459, 465 (Ky. 1998), where the Kentucky Supreme Court held that claim preclusion does not apply unless the two causes of action are identical.

A. The Transactional Rule Is Inapplicable As Respondents Have Not Split Their Causes Of Action.

In fashioning their claim preclusion argument, Petitioners rely on two cases which are inapposite to the undisputed facts and procedural history of the case at hand, namely *Harris v. Ashley*, 165 F.3d 27 (CA6 1998) and *Dennis v. Fiscal Court of Bullitt County*, 784 S.W.2d 608 (Ky. App. 1990). These two cases, and the precedent for these cases, apply a transactional approach to determine if a single cause of action has been improperly split and therefore barred by res judicata. Splitting a cause of action is a subsidiary of res judicata that is not at issue in this case.

In *Harris, supra*, when his state complaint was dismissed, plaintiff subsequently filed suit in federal court. The Sixth Circuit stated, "the rule against splitting claims is nothing more than that aspect of res judicata which requires the court to determine the scope of the prior claim; i.e., to decide if the second action involves issues which should have been litigated in the first action, but were not" *Id.* at 27. The plaintiff clearly intended all his claims to be litigated in the original court, but filed a second complaint in an attempt to take a "second bite of the apple" **after his first complaint was dismissed.**

The court in *Harris* thus invoked the rule against splitting claims as set forth in RESTATEMENT (SECOND) OF JUDGMENTS § 24 to conclude that the second complaint was properly barred. "Applying Kentucky law to the case at hand, it is obvious that *Harris's* prior whistleblower suit involved the same transaction as her current § 1983 suit: namely her vocal criticism of the Kentucky Department of Financial Institutions and her supervisor's decision to discharge her, allegedly in retaliation for that criticism." *Id.* In contrast, as recounted in detail above, Respondent's § 1983 claim herein does not hinge on the manner of Conni Black's death in colliding with the guardrail, the dispositive factual consideration in the state wrongful death claim, but rather hinges on the events occurring at the police stop.

In *Dennis, supra,* a terminated police officer's § 1983 action had been dismissed by the federal court on the basis of Kentucky's one-year statute of limitations for personal injury claims (the most closely analogous claim). The officer subsequently filed the same claims ("essentially mirrored the allegations") in state court. 784 S.W.2d at 609. The Kentucky Court of Appeals held that when the federal court had dismissed the civil rights claim based on limitations, the federal court opinion effectively dismissed the claim on its merits and thereby exercised pendent jurisdiction over the state law claims and dismissed them as well. *Id.* at 611. Applying the subsidiary rule set forth in RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982), the court held that plaintiff improperly split his cause of action as "it is abundantly clear that appellant intended to litigate all his claims, those arising under both federal as well as state law, in federal court." *Id.* In contrast, in the case at hand, both the Kentucky Supreme Court and the Sixth Circuit recognized the critical legal and factual distinctions between a state wrongful death claim on the one hand and a substantive due process claim on the other. Whereas the former depended upon a special relationship between the police and decedent at the time of the guardrail collision, the latter depended upon the knowledge and conduct of

the police officers at the investigative stop which had preceded the fatal collision.

In sum, *Harris* is clearly distinguishable from the present case as Respondents filed ***simultaneous*** suits with the clear original intention of bringing two separate causes of action in federal and state court. Respondents in no way sought, nor currently seek, to "take a second bite of the apple," as *Harris* would discourage. Indeed, the thrust of the federal lawsuit was not to prove that there was a "special relationship" between Conni Black and the police at the time of the collision, but rather a custodial relationship based on the totality of the circumstances transpiring during the police stop. *Dennis* is similarly distinguishable from the case at hand. Respondents were in no way ***required*** to file suit in either state or federal court. Thus, the cause of action was not improperly split.

A closer examination of Kentucky case law on splitting a cause of action makes it even clearer that this doctrine is foreign to the case at hand. The chief precedential cases in Kentucky regarding claim splitting are *Kirchner v. Riherd*, 702 S.W.2d 33 (Ky. 1985) and *Egbert v. Curtis*, 695 S.W.2d 123 (Ky. App. 1985). In *Kirchner*, the plaintiff filed suit in circuit court for personal injuries suffered in an automobile accident. The defendant filed a motion to dismiss, pleading res judicata as a result of Riherd splitting his cause of action, having previously filed an action against the defendant in small claims court for property damage arising out of the same accident. The Kentucky Supreme Court held that splitting a cause of action bars a party who has sued for a part of an entire demand to sue for the residue in another action. *Kirchner* also cited the RESTATEMENT (SECOND) OF JUDGMENTS, § 24 (1982), for support. 702 S.W.2d at 34. Thus property damage and personal injury claims **arising out of the same accident** must be brought in one action. This of course does not mean that a state wrongful death claim arising out of a highway accident must be brought in the same case asserting a substantive due process claim arising out of a police stop.

Similarly, in *Egbert v. Curtis*, 695 S.W.2d 123 (Ky. App. 1985), the court barred a plaintiff from suing in district court after receiving judgment in small claims court. The court noted that a subsidiary rule of res judicata is that a cause of action may not be split and tried piecemeal. *Id.* at 124. The court found that the plaintiff's counterclaim was compulsory and thus belonged in the earlier litigation, and therefore was res judicata under the subsidiary rule prohibiting the splitting of a cause of action. *Id.*

In *Arnold v. K-Mart Corporation*, 747 S.W.2d 130 (Ky. App. 1988), where an employee lost an action in small claims and thereafter brought an action in circuit court, the opinion distinguished *Kirchner* and *Egbert*. In *Arnold*, the Kentucky Court of Appeals noted that the relief sought in small claims court, judgment for salary and benefits, was a different subject matter than damages requested of the circuit court for wrongful termination:

> In our view, the district court did not have to decide whether or not the termination was wrongful in order to find that K-Mart owed the salary and benefits. The question of the wrongfulness of the appellant's discharge is simply not 'material' or 'essential' to a determination of whether K-Mart owed a debt to the appellant. Therefore, the instant action is not barred by res judicata.

Id. at 133. A synthesis of these Kentucky cases shows that causes of action are improperly split only where a subsequent action is filed due to the failure of the first action, and the claims in the subsequent action were required to be brought in the original action.

The Kentucky courts frequently cite the RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) in support of their holdings on splitting cause of action defenses. A review of § 24 reveals its inapplicability, and consequently the inapplicability of the rule against splitting a cause of action, to the present case. Section 24 states in relevant part:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Section 24 therefore applies only when a final judgment in one action serves to bar the plaintiff's claim in a second action. If that occurs, all claims that are part of the transaction are extinguished along with a plaintiff's second claim. This typically occurs in cases where a plaintiff receives an unfavorable result and brings a new set of claims against the same party. The purpose behind the rule, as stated by Petitioners, is to prevent a never-ending lawsuit. Hence, the rule applies to ***subsequent*** suits, not to parallel suits filed at the same time.[4]

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[4] *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 25(e) (1982), entitled "Exemplifications of General Rule Concerning Claim Splitting," which states that "A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground." The Restatement provides two illustrations to show when a second suit would not be permitted. The first illustration states that where a party's action is dismissed from federal court, and the party then seeks to commence an action for damages against B in a state court, the state court action is barred. The second illustration bars a subsequent suit when judgment is entered against a plaintiff in state court, and the plaintiff then subsequently attempts to bring an action against B in a federal court for the same action. The Restatement upon which Petitioners rely thus applies only to federal or state claims ***brought subsequent to*** the resolution of the original action.

The case *sub judice* is completely distinguishable from the Kentucky case law that applies the transactional rule to determine the extent res judicata bars claims that were improperly split. The rule against claim splitting exists to prevent "reactive claims," or claims which are brought subsequent to, or "in reaction to," a dismissal in order that the plaintiff can attempt to secure redress in another manner. Reactive claims are clearly an attempt to take two bites of the apple. Respondent's parallel, simultaneous suits were not improperly split, therefore the transactional rule does not apply. Respondents did not file a subsequent action after having lost a previous action. Nor were Respondents required to file their claims together in one court. Respondents exercised their right to choose a forum by filing simultaneous cases in order that their federal claim could be decided in federal court and their state claim in state court. The subsidiary rule to res judicata simply does not apply to this case.

B. The Transactional Rule Does Not Bar Respondents' Claims.

Although the case law makes clear that Respondents have not split their cause of action and the transactional rule therefore does not apply, application of the transactional rule to the present case illustrates the ultimate futility of Petitioners' argument. Assuming, for the sake of argument only, that Petitioners' "splitting the causes of action" argument is applicable, Respondents' claims are nevertheless not barred by the transactional rule.

Petitioners notably fail to define the full scope and limitations of the transactional approach in Kentucky case law. Petitioners cite *Harris v. Ashley*, 165 F.3d 27 (CA6 1998), as a case on point. *Harris* defines the transactional approach as follows:

> Like the Restatement, Kentucky law takes a transactional approach to determine whether there is a sufficient identity of causes of action – ***an approach which looks beyond the legal***

> ***theories asserted to see if the two claims stem from the same underlying factual circumstances***. In *Dennis*, for example, the court held that an assessment of identity of claims requires the court to look at claim ***in factual terms*** and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 27 (emphasis added). The *sine qua non* of the transactional approach is therefore an examination of the exact factual circumstances surrounding the separate claims. Where the claims do not stem from the same underlying factual circumstances, the claims are not required to be litigated in the same action. Thus, the *Harris* court found that the plaintiff's whistleblower suit and § 1983 suit were based on the same transaction because they stemmed from the exact same set of facts: plaintiff's vocal criticism of her employer.

Compare, however, *Watts v. K, S & H*, 957 S.W.2d 233 (Ky. 1997), in which the Kentucky Supreme Court reversed a decision by the Kentucky Court of Appeals applying res judicata to bar a dram shop action where the plaintiff had previously brought a negligence suit against the drunk driver to whom the dram shop defendant had sold liquor. *Id.* at 237. The *Watts* court explained that there was no identity between the two causes of action because the first action involved the drunk driver's negligence in operating the vehicle that collided with plaintiff, whereas the second action involved the liquor store's negligence in selling alcohol to the minor who later became drunk and collided with plaintiff. *Id.* at 238. "To put

it in transactional terms, the two cases did not arise from the same set of facts: the negligence action focused on the accident and the dram shop claim focused on the purchase of alcohol." *Harris*, 165 F.3d at 27 (discussing *Watts*). *Watts* thus expressed a clear limitation on the rule against splitting the cause of action: it does not apply where the cases do not arise from the same set of facts, even if those facts are causally related. Thus, even though the causes of action in *Watts* were both temporally and causally tied together in that the drinking precipitated the accident, the subsequent action was nevertheless not barred by claim preclusion because the legal/factual basis of each claim was sufficiently distinct. *See also Hays v. Sturgill*, 193 S.W.2d 648 (Ky. 1946) (holding will construction case sufficiently distinct from subsequent claim concerning grantor's soundness of mind).

In *Smith v. Bob Smith Chevrolet, Inc.*, 275 F. Supp. 2d 808 (W.D. Ky. 2003), plaintiff brought suit in state court for breach of a sales contract on a vehicle and subsequently brought suit in federal court alleging violations of the Fair Credit Reporting Act. The court held that pursuant to *Watts* and *Hays*, the plaintiff's federal claims were not precluded:

> Though both lawsuits arise out of an automobile sale, the similarities end there. More simply put, the first case involves the sale price of an automobile and the second an arguable invasion of privacy. The first judgment is therefore not necessarily conclusive of matters which were not germane to, implied in or essentially connected with the actual issues in the case although they may affect the ultimate rights of the parties and might have been presented in the former action. Therefore, one cannot say that the breach of contract and Fair Credit Reporting Act claims involve relitigation of the same issues and facts.

> Kentucky's claim preclusion rule does not bar this action.

Id. at 814-815 (internal citations and quotations omitted).

Like the situations in *Watts, Hays* and *Smith*, Chipman's federal and state actions did not arise from the same set of facts: the state action focused on the accident and the federal claim focused on the police stop. Nor does Stemler's fabrication of evidence claim stem from the same set of facts underlying her state court claims. Thus, the facts involved in her fabrication claim are based on the individual actions of Officer Wince in the days and weeks subsequent to the police stop and Stemler's arrest. Petitioners' exceedingly broad application of "transactional nucleus" would lead to the unacceptable preclusion of claims that do not share a common core of related facts. It is irrelevant to a transactional analysis that the separate factual circumstances involve the same parties and occurred on the same date; it is also irrelevant in the case at hand that the police stop and the accident are causally related. What is essential to such an analysis is the clear delineation of disparate facts underlying separate causes of action. The police stop is ***not*** relevant to the state claim (as the Kentucky Supreme Court held), just as the accident scenario is ***not*** relevant to a determination of the federal claim (as the Sixth Circuit held). Nor are the events of the police stop or the accident scene relevant to Stemler's fabrication of evidence claim.

Regarding Stemler's excessive force claim, Petitioners would like to have their cake and eat it too. Petitioners argue against "splitting a cause of action" as they define it, yet argue that Stemler should have revived the excessive force claim in state court rather than federal court even though the only remaining claims were in federal court. The voluntary dismissal agreements, which Petitioners'

agreed to, permitted Stemler to revive her claim in either forum. *See, e.g., Stemler*, 350 F.3d at 591.

Petitioners' application of the transactional analysis is fatally flawed. Assuming *arguendo* that the transactional rule is applicable, it nevertheless does not bar Respondents' claims.

C. Respondents' Federal And State Causes Of Action Are Not "The Same" For Purposes Of Claim Preclusion.

The law regarding claim preclusion that Petitioners seek to apply is clearly not on point, as discussed above. The applicable rule of law is set forth in the recent seminal Kentucky Supreme Court opinion in *Yeoman v. Kentucky Health Policy Board*, 983 S.W.2d 459, 465 (Ky. 1998), which strikes the death knell to Petitioners' claim preclusion argument.

In *Yeoman*, the Kentucky Supreme Court took the opportunity to define the two components of res judicata. The issues arose in the context of a suit challenging the constitutionality of Kentucky House Bill 250, legislation aimed at making wide-ranging health care reforms. Since there had been litigation challenging earlier legislation which had included similar health care reform proposals (*viz.*, House Bill 1), the Court first had to resolve claims that the prior litigation would preclude the claim then before it. The Court rejected the applicability of claim preclusion finding that House Bill 250 was similar but not identical to House Bill 1.

Yeoman states that "claim preclusion bars a party from re-litigating a previously adjudicated cause of action." *Id.*, at 465 (emphasis added). *Yeoman* sets forth the elements of claim preclusion as follows: "First, there must be identity of the parties. Second, there must be identity of

the causes of action. Third, the action must have been resolved on the merits." *Id., citing Newman v. Newman,* 451 S.W.2d 417, 419 (Ky. 1978). Identity of the causes of action means "the subject matter of the subsequent suit must be identical." *Id.* Petitioners recognized as much in their brief, actually citing *Whittaker v. Cecil*, 69 S.W.3d 69 (Ky. 2002), as follows: " . . . the doctrine [of res judicata] does not act as a bar in a subsequent proceeding if the issues or questions of law are different. . . ." Petition for Writ of Certiorari, p. 25. In the absence of prohibited claim-splitting (i.e., two claims arising out of the exact same facts), *Yeoman* has made clear that the causes of action must be identical for claim preclusion to be applicable.

In the present case, the causes of action decided by the state court are clearly not identical to the causes of action before the federal court. Chipman's state wrongful death claim required a legal analysis of the existence of a "special relationship" between Black and the officers at the time the Kritis' truck struck the guardrail. Chipman's federal § 1983 claim required a legal analysis of the existence of "custody" of Black by the officers at the time of the police stop. Stemler's federal excessive force and fabrication of evidence claims were not considered by the state courts; therefore, under the third prong of *Yeoman*, the claims are not barred by claim preclusion because they were not resolved "on the merits." *See Yeoman, supra*, at 465.

CONCLUSION

The Sixth Circuit Court of Appeals was correct in concluding that the *Rooker-Feldman* doctrine is not applicable to the case at hand, whether that doctrine is construed broadly or narrowly. Likewise, Petitioners' claim preclusion argument is of no avail because Respondents'

substantive due process, excessive force and fabrication of evidence claims are neither factually nor legally the same as their state court claims. Therefore the Petition for Writ of Certiorari ought not to be granted.

Respectfully submitted,

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SUSAN STEMLER, Plaintiff-Appellant, v. CITY OF FLORENCE; BOBBY JOE WINCE; THOMAS DUSING; and JOHN DOLAN, Defendants-Appellees. WILLIAM CHIPMAN, Administrator of the Estate of Conni Black, Plaintiff-Appellant, v. CITY OF FLORENCE; BOBBY JOE WINCE; THOMAS DUSING; JOHN DOLAN; RON KENNER, Boone County Sheriff; ROB REUTHE; and CHRIS ALSIP, Defendants-Appellees.

No. 96-5993, No. 96-5996

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

126 F.3d 856; 1997 U.S. App. LEXIS 27677; 1997 FED App. 0300P (6th Cir.)

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JUDGES: Before: MERRITT, WELLFORD, and BOGGS, Circuit Judges. BOGGS, J., delivered the opinion of the court, in which MERRITT, J., joined. WELLFORD, J. (pp. 35-38), delivered a separate concurring opinion.

OPINION BY: BOGGS

OPINION:

BOGGS, Circuit Judge. In No. 96-5996, the estate of Conni Black (hereinafter "Black") appeals the judgment entered against her on her substantive due process claim against officers of Boone County, Kentucky, and of the City of Florence arising from her death in a car accident on the night of February 18, 1994, shortly after those officers removed her from the car of Susan Stemler and placed her in the truck of her drunk and violently abusive boyfriend, Steve Kritis. In No. 96-5993, Stemler appeals the judgment entered against her on her claims of false arrest, malicious prosecution, and violation of equal protection arising from her arrest at that time for driving under the influence; she alleges that the officers arrested her solely because they believed her to be a lesbian. For the reasons explained herein, with respect to both plaintiffs, we affirm the district court's award of summary judgment to the City of Florence and to the Boone County defendants in their official capacities. However, we reverse the dismissal of Black's complaint against the individual officers, and we also reverse the dismissal of Stemler's complaint against the individual officers with respect to her equal protection claim.

I. Background

A. The Assaults and Car Chase

On February 18, 1994, at about 10:45 p.m., Conni Black and her boyfriend, Steve Kritis, arrived at Willie's Saloon in the Ramada Inn in Florence, Kentucky.[1] Both Black and Kritis had been drinking heavily. While line dancing, Black met Susan Stemler. Around 2:00 a.m., the two went to the women's restroom and discussed problems that each had with their respective boyfriends. During this conversation, Black told Stemler that she wanted to leave Kritis. According to one witness, Christine Stillwell:

> Steve Kritis then burst into the restroom and slung the door to the restroom hard. He came into the restroom yelling. He stated in part: "If you don't get your fucking sister out of here, I'll kill the bitch." He yelled this at Laura Stemler.
>
> He grabbed Conni Black on the arm as he screamed at her. He slammed her against a toilet stall. He then yanked her out of the restroom. After he left the restroom, I could still hear him screaming outside of the restroom. . . . Conni came back into the restroom. He yanked her out physically of the restroom a second time.
>
> At this point, I wondered why nobody had called the police. When I went out of the restroom and into the lobby of the Ramada, I observed Kritis pushing Conni around in the

[1] The procedural postures of these cases are somewhat odd, since in both cases we are presented with an appeal from a dismissal under Rule 12(b)(6) with respect to some defendants and an appeal from summary judgment with respect to other defendants. Except where otherwise noted, this opinion will discuss the record evidence viewed in the light most favorable to the appellants.

> parking lot. As I went outside into the parking lot, I observed Kritis still pushing Conni. . . .
>
> Kritis put his forehead against Conni's and put his hands behind his back. For every step Conni took to flee Kritis, Kritis took one forward still pressing his forehead against hers. He then made a fist to hit her. He looked at me and saw that I was watching and released his fist.

According to Stemler, after Kritis removed Black from the restroom, Kritis slammed Black against a concrete wall in the hotel lobby; Black's head hit the wall and she briefly passed out. Black asked Stemler to drive her home, and Stemler agreed. As they were leaving, Kritis struck Stemler in the back of the head with a blunt object. Stemler and Black got into Stemler's car and drove away at about 2:15 a.m. Kritis pursued them in his truck. Kritis did not have his headlights on. At one point during the chase, Kritis rear-ended Stemler's car with his truck in an attempt to make her car stop. A witness, Terry Barker, was driving east on U.S. 42 in Florence at the time; he saw that Kritis was chasing the women and that the women were in obvious distress, and decided to follow the vehicles.

According to Barker, at one point the truck got ahead of the car and forced it down Woodland Avenue, which ends in a cul-de-sac. Stemler pulled her car into a driveway, and Kritis stopped his car behind her to block her access to the street. Fortunately, the driveway belonged to William Minnick, a retired Florence police officer. His wife, Nancy Minnick, heard a horn blowing at about 2:30 a.m. When she opened her door, she saw Kritis standing in her driveway on the passenger side of the car. Kritis was hitting the car window and yelling. The car backed out

around the truck and drove up the street. Kritis jumped in the car and again gave chase; according to Barker, he was driving at about sixty miles per hour on the sidewalk of the residential street. By this point, Mr. Minnick was awake and dressed; he called 911, and then got in his car and followed Kritis and Stemler. Barker also continued to follow them.

B. The Police Stop

After the vehicles pulled back on to U.S. 42, they stopped at a light at Tanners Lane. Barker flashed his lights to alert a nearby police officer, defendant Lieutenant Thomas Dusing, an officer of the Florence Police Department, who was responding to the 911 call. When Dusing pulled up to Barker, Barker informed him that there was a "serious problem" with the two vehicles ahead of him, and that Kritis appeared to be a threat to the safety of the two women. After speaking with Barker, Dusing pulled his cruiser in front of Stemler's car and Kritis's truck at the intersection. As he left the cruiser, Stemler jumped out of her car and ran to him. Stemler told Dusing that Kritis was drunk, that he had assaulted both her and Black, that he had threatened to kill her, and that he had placed both of them in danger by chasing after them at high speed. She was obviously emotionally distraught, and cried while she related the evening's events to Dusing. While Dusing spoke with Stemler, four other officers arrived at the scene in separate cars: officers Bobby Joe Wince and John Dolan of the Florence Police Department, and officers Rob Reuthe and Chris Alsip of the Boone County Sheriff's Office. Each of the four would later be named as defendants in this litigation along with Dusing.

During Stemler's conversation with Dusing, Reuthe approached Kritis, who was seated in his truck. According to Reuthe's testimony, Kritis told him that Stemler was a lesbian,[2] and that she was kidnapping his girlfriend. After speaking with Stemler, Dusing approached Reuthe; Dusing would later testify that Reuthe told him at that time that Stemler was a lesbian. Reuthe also told Dusing that Kritis smelled of alcohol, but that he had not tested Kritis for intoxication. Dusing then approached Kritis, who repeated his assertion that Stemler was a lesbian. Kritis also asked Dusing to bring Black to his truck; Dusing told him that he would see what he could do. Dusing asked Kritis whether he had seen Stemler driving the car, and whether he would be willing to testify against Stemler.

Dusing would later submit a police report claiming that he did not smell alcohol on Kritis's breath at that time. This claim is contrary to his contemporaneous statements to Wince and to Mr. Minnick that Kritis smelled of alcohol. A blood test taken over two hours later would reveal that Kritis had a blood alcohol level of .115, which indicates that at the time of the police stop, his blood alcohol level was probably between .155 and .175, at least one-and-a-half times the legal limit in Kentucky of .10.[3] Subsequent observers would also testify that, over an hour after the police stop, it was immediately apparent that Kritis was very drunk. Nevertheless, neither Dusing nor any other officer ever tested Kritis for intoxication, or even asked him to step out of the truck.

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[2] Stemler denies that she is a lesbian.

[3] Both Black's complaint and Stemler's complaint allege that Kritis's blood alcohol level at the time of the police stop was .20.

At some point, Dusing asked Wince to test Stemler for intoxication. By that time, Wince had already heard Kritis's allegation that Stemler was a lesbian. Wince did not find any of the standard DUI indicators in examining Stemler; she did not have affected speech, impaired balance, impaired walking, or impaired coordination, and she did not seem disoriented. According to Wince, Stemler failed the horizontal nystagmus gaze field test, a test in which uncontrolled movement in a suspect's eyes may indicate drunkenness. However, Stemler alleges that Wince did not know how to perform that test properly, and had to ask for assistance with the test from Dolan. Stemler alleges further that Dolan also did not know how to perform the nystagmus test. Wince testified that the breathalyzer revealed a blood alcohol level of .105.[4] Stemler alleges that the breathalyzer was not properly calibrated.

After performing the field tests, Wince conferred with Dusing and Dolan. By this time, all three officers had heard Kritis's claim that Stemler was a lesbian. Dusing decided that they should arrest Stemler for driving under the influence, and the other officers agreed. Dusing would later concede that, in deciding to arrest Stemler and not Kritis, he relied on Kritis's version of events more than he did Stemler's. Wince approached Stemler, informed her that she was under arrest, and asked her who she would like to tow her car. Stemler broke into tears, pointed at Kritis, and asked Wince, "Aren't you going to check him? Why don't you check him?" As she was pointing, Wince

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[4] Stemler's complaint alleges that she had a blood alcohol level below .10 at the time of the police stop.

grabbed her arm, pulled it behind her, and placed her in handcuffs.[5]

At approximately the same time, two unknown officers, one each from Florence and from Boone County, approached Barker, who was parked across the street. Barker related the complete story of the chase to both officers. Barker overheard one of the officers relating his story to a third officer. The officers asked him whether he saw Stemler driving the car, and whether he would be willing to testify against Stemler in court. Upon learning that Stemler was being placed under arrest, Barker told the officers that they were arresting the wrong person and that Kritis was obviously "crazy"; the officers didn't appreciate that, became "arrogant," and told him that he didn't "know what's going on" and that he could "go on about your business." Barker was dumbfounded and angered by the officers' actions. Barker confirms that the police never asked Kritis to leave the truck, despite the fact that, as during the chase, Kritis still had not turned his headlights on. Although the officers told Barker that they would contact him to be a witness against Stemler, they never did so. Furthermore, Wince failed to list Barker as a witness at the scene in his field notes, and the card on which the officers supposedly were writing down Barker's name and telephone number was lost.

While Wince was testing Stemler for intoxication, Mr. Minnick arrived at the scene. He spoke first with defendant Boone County Officer Chris Alsip. Alsip immediately

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[5] In her complaint, Stemler alleges that Wince used excessive force in handcuffing her. The district court denied Wince's motion to dismiss this claim; however, Stemler has voluntarily dismissed her excessive force claim.

"informed" him that Stemler was a lesbian. Minnick thought that it was odd that Alsip could state that fact with such certainty, given that Stemler had out-of-state license plates. Wince also made a point of informing Minnick that Stemler was a lesbian. Although the officers at the police stop were aware that Minnick had observed Kritis chasing Stemler, they asked him only whether they observed Stemler driving her car.

Dusing ordered Dolan to approach Black, who was still in the passenger seat of Stemler's car, and to inform her that she would be arrested for public intoxication "if she didn't want to leave with the male." At that time, Black was very intoxicated; her eyes were glassy and she slurred her words. Alsip and Dolan lifted her out of the car and assisted her to Kritis's truck. Black stumbled as she walked to the truck. Alsip physically placed her into the passenger seat in the truck. Alsip would later admit that he never heard Black say that she wanted to leave with Kritis.[6] Dusing told Alsip only that Stemler was a lesbian and that Kritis did not want his girlfriend with her; Alsip would later concede that, if he had known of all the preceding events that evening, he would not have placed Black in the truck but instead would have arrested Kritis.

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[6] Black's complaint alleges that, "having lost the assistance of Susan Stemler, under threat of arrest and against her will," she capitulated and allowed herself to be placed into Kritis's truck. Dolan testified that Black asked if she could leave with Kritis; however, Black's estate argues that Dolan had an incentive to be untruthful on this point, and that the issue of his veracity should be reserved for the factfinder. Given the officers' admissions that Dusing ordered Dolan to threaten Black with arrest, and Black's earlier unwillingness to leave with Kritis, a view of the evidence most favorable to Black would indicate that she involuntarily left the scene of the police stop with Kritis.

C. The Subsequent Accident

As soon as Black was in the truck, at about 3:00 a.m., Kritis drove away. Kritis drove two blocks from the police stop and then turned onto the northbound lanes of I-75. Black had passed out in the truck. According to Kritis, when she woke up, she "went haywire" and began hitting him; he hit her back and lost control of the truck. The truck swerved to the right and collided side-to-side with a guardrail. The impact threw Black partially out of the passenger side window. Black's arm was completely severed from her body and her head was severed into two parts. The truck was damaged and the front tire was blown. Kritis continued to drive slowly on I-75 and then east on I-275 until the truck could proceed no further.

A passing motorist, Kristopher Waldespuhl, was waved down by Kritis around 3:45 a.m. Kritis said, "my girlfriend is kind of hurt," and asked for help. According to Waldespuhl, Kritis spoke "very nonchalantly," and "had no emotions at all, wasn't upset." It was immediately obvious to Waldespuhl that Kritis was drunk; Kritis had alcohol on his breath, his eyes were glazed and bloodshot, and he was not acting sober. Kritis admitted to Waldespuhl that he was drunk. He also told Waldespuhl that "they were fighting at Willie's and some dyke bitch took her from me." Waldespuhl walked over to the other side of the truck. It was immediately apparent to Waldespuhl that Black was dead, although Kritis was unaware of this fact. Waldespuhl left to place a 911 call.

Officer Stephen Johnson of the Lakeside Park-Crestview Police Department arrived at the scene. It was obvious to Johnson that Kritis was drunk; he did not even need to conduct a field sobriety test to determine that he

had probable cause to arrest Kritis. Another officer at the scene, Mike Mann, also immediately determined that Kritis was drunk. According to Mann, "Steve Kritis told me that he and his girlfriend were fighting and exchanging blows. He stated that he felt a large 'thud' but continued driving the truck. His truck started to quit and he pulled over." Johnson placed Kritis under arrest for driving under the influence at 4:30 a.m.[7]

An accident reconstruction specialist, Detective Jack Prindle, determined that, at the time of the impact with the guardrail, the truck was traveling at sixty-six miles per hour. The truck had traveled from the scene of the police stop to the scene of the accident in about five minutes. The accident occurred when the steering wheel turned abruptly to the right; there is no way to know what caused the wheel to turn. As the vehicle struck the guardrail, Black was partially ejected, causing her head and right arm to be severed on the guardrail. Kritis continued on for 2.5 miles before stopping.

D. Stemler's Prosecution

After arresting Stemler, Wince took her for a blood test. Stemler claims that she had had only a half-glass of beer and two Irish coffees over the course of the night. She suspects that the officers tampered with her blood sample, which allegedly revealed a .17 blood alcohol level an hour after the breathalyzer allegedly revealed a .105 blood

[7] Kritis would subsequently plead guilty in the Boone County District Court to manslaughter in the second degree and to wanton endangerment in the first degree. He was sentenced only to probation. After violating the terms of his probation, he is now serving a five-year prison sentence.

alcohol level. Wince handled her blood sample after he learned that Black had died. Larry Dehus, a "forensic scientist," reviewed the specimens and the timing of the tests and concluded that the sample's integrity had been destroyed, given that Wince waited five days to deliver the sample and that there were no procedures to guard against tampering. When a blood sample is submitted to the detective's office of the Florence Police Department, the clerk of that office, Mary Hayes, is supposed to receive a property card and an evidence tag; Hayes never received either with respect to Stemler's blood sample. This was a violation of department policy. Stemler's sample was the only sample that Wince had ever kept in the Florence Police Department refrigerator for five days in his career, and was also the only sample that he had ever personally driven to the lab. According to Officer Chester Snow, who supervised the property room, it would be "highly irregular" to keep a sample in the refrigerator for five days.

Stemler was prosecuted in the Boone County District Court for driving under the influence of alcohol. She defended the charge on the ground that the evidence against her had been fabricated. Dr. Gordon James testified at her trial that the handling of the blood sample was "arbitrary" and that the chain of custody had not been established. Her first trial resulted in a hung jury. She was retried. Although Wince claimed at Stemler's first DUI trial that he had not completed an evidence card, at the retrial he produced a completed card which neither Hayes nor Snow had ever seen. He claimed that he completed the card on February 19, at the time of the arrest; Hayes testified that if that were true, she should have seen the card. The second jury acquitted Stemler.

E. Related State Court Proceedings

On March 7, 1994, Black's estate filed a wrongful death action under Kentucky law against each of the defendants in this case in the Boone County Circuit Court. *Chipman v. Florence,* No. 94-CI-00202. Stemler also brought suit against the defendants herein in the Boone County Circuit Court, raising state-law claims of malicious prosecution, false arrest, abuse of process, assault and battery, false imprisonment and negligent or intentional infliction of emotional distress. *Stemler v. Florence,* No. 94-CI-00459. The state court consolidated the two suits, and in separate orders on April 2 and April 26, 1996, it awarded the defendants summary judgment on all claims except Stemler's assault and battery claim against Wince. Stemler voluntarily dismissed that claim. Both Black and Stemler have appealed the judgments against them, and their appeals are pending in the Kentucky Court of Appeals.

F. Proceedings Below

On March 31, 1994, William Chipman, the administrator of the estate of Conni Black, filed a complaint in the United States District Court for the Eastern District of Kentucky against Dusing, Dolan, Wince, Reuthe, and Alsip. The complaint also named the City of Florence and Ron Kenner, the Boone County Sheriff.[8] The complaint

[8] The appellees have informed the court that Kenner died on May 11, 1997. The appellees should have informed the court at the same time of the identity of Kenner's successor. *See* FED. R. APP. P. 43(c). Since Black sued Kenner only in his official capacity as Boone County sheriff, for the purposes of this appeal we will treat the claims against

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alleged that the defendants were liable under 42 U.S.C. § 1983 for Black's wrongful death, insofar as the defendants had displayed deliberate indifference in placing her in the car in which she was later killed. On August 2, 1994, the district court granted the individual officers' motions to dismiss under FED. R. CIV. P. 12(b)(6) on the ground of qualified immunity. *Chipman v. City of Florence,* 858 F. Supp. 87 (E.D. KY. 1994), *reconsideration denied on amended complaint,* 866 F. Supp. 332 (E.D. KY. 1994). On July 3, 1996, the district court granted the City of Florence's and Boone County's motions for summary judgment. Black now appeals, and her appeal is pending under docket number 96-5996.

On January 24, 1995, Susan Stemler filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Kentucky against Wince, Dusing, Dolan, and the City of Florence. The complaint alleged claims of excessive force, wrongful arrest, malicious prosecution, and violation of equal protection on the bases of sex and sexual orientation. On October 6, 1995, the district court granted the individual officers' motion to dismiss on grounds of qualified immunity. On July 3, 1996, after consolidating Stemler's case with Black's, the district court awarded summary judgment to the City of Florence. Stemler now appeals both orders, and her appeal is docketed in this court as No. 96-5993.

We have consolidated the two appeals for consideration. We will consider first both plaintiffs' claims against the municipal defendants, then Black's claims against the

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him and the other Boone County defendants in their official capacities as a suit directly against Boone County.

individual officers, and finally Stemler's claims against the individual officers.

II. Municipal Liability Under § 1983

We may easily dispose of the claims against the City of Florence and Boone County. While a municipality may be held liable under 42 U.S.C. § 1983 for a constitutional violation directly attributable to it, § 1983 does not impose vicarious liability on a municipality for the constitutional torts of its employees. *See Monell v. Department of Soc. Servs. of the City of New York,* 436 U.S. 658, 692, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). Therefore, in order to state a claim against a city or a county under § 1983, a plaintiff must show that his injury was caused by an unconstitutional "policy" or "custom" of the municipality. *See Pembaur v. City of Cincinnati,* 475 U.S. 469, 480-81, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986). The plaintiffs both assert that they were injured by the municipalities' allegedly deficient training programs. Where, as here, the identified policy is itself facially lawful, the plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice." *Board of County Comm'rs of Bryan County v. Brown,* 137 L. Ed. 2d 626, 117 S. Ct. 1382, 1390 (1997) (quoting *City of Canton v. Harris,* 489 U.S. 378, 388, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989)). "'Deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown,* 117 S. Ct. at 1391. In other words, the risk of a constitutional violation arising as a result of the inadequacies in the municipal policy must be "plainly obvious." *Id.* at 1393.

As noted above, in the present case, both Stemler and Black argue that the municipalities should be held liable as a result of their failure to train their officers adequately. Neither plaintiff has demonstrated that there is a genuine issue of material fact as to whether the training programs were adequate, or as to whether the city or the county acted with deliberate indifference to the risk of a constitutional violation. Officers of both the city and the county are required to attend the Basic Police Academy of the Kentucky Justice Cabinet Department of Criminal Justice Training. The academy is a 400-hour course in which officers are taught the elements of criminal offenses under Kentucky law, the definition of probable cause, and procedures for the handling of evidence. At the academy, officers are also taught how to ensure the safety of potential victims of domestic violence. In addition, both the city and the county require their officers to attend a forty-hour training class every year; this program also includes training as to the proper response to an allegation of domestic violence. Neither Stemler nor Black have identified any reason to believe that the training programs were inadequate in any way. Each argues only that the defendant officers lacked complete familiarity with their department's policy manuals; however, neither plaintiff asserts any reason to believe that the city or the county did not take proper steps to ensure that their officers knew and complied with their policies.

Furthermore, a plaintiff ordinarily cannot show that a municipality acted with deliberate indifference without showing that the municipality was aware of prior unconstitutional actions of its employees and failed to respond. *See Brown,* 117 S. Ct. at 1390; *Canton,* 489 U.S. at 390-91. The plaintiffs are unable to identify any prior instances of

misconduct in the Boone County Sheriff's Department. With respect to the City of Florence, they argue only that Wince had once had a sexual harassment complaint filed against him by a co-worker.[9] However, there is no indication that the city failed to respond appropriately to that complaint, or that because of that one complaint it should have been "plainly obvious" to the city that Wince would falsely arrest a woman solely on the basis of her perceived sexual orientation or force a woman against her will into the truck of a drunk and violently abusive man. Therefore, because the plaintiffs cannot show that either the city or the county acted with deliberate indifference to the risk of a constitutional tort, the award of summary judgment to the municipal defendants must be affirmed.

III. Black's Substantive Due Process Claim

A. Test for Qualified Immunity

We turn now to the merits of Black's claim against the individual officers. She alleges that the officers violated her right to "substantive due process"[10] under the Fourteenth

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[9] During the course of discovery, Stemler was denied access to the defendants' personnel files. Instead, the magistrate judge conducted an in camera review of those files and determined that they did not contain relevant evidence. Stemler now claims that the magistrate judge erred and that the files may contain evidence of other incidents to which the City of Florence failed to respond. However, she has waived this claim by failing to appeal the magistrate judge's ruling to district court. *See* FED. R. CIV. P. 72(a).

[10] In contrast to procedural due process, which guarantees that individuals will be afforded fair procedures before they are deprived of life, liberty, or property, substantive due process protects individuals against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). *But cf.* JOHN HART ELY,

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Amendment by forcing her to leave the scene of the police stop in Kritis's truck. In other words, her claim is that the officers deprived her of her liberty (and, ultimately, her life) without due process of law by threatening to arrest her if she did not leave with Kritis, and by physically placing her against her will in his truck. Because Black seeks to hold the officers liable in their individual capacities under 42 U.S.C. § 1983, she must show not only that the officers' actions were unconstitutional, but also that they should have known at that time that they were violating her rights. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

> It is not necessary that the very action have been previously held unlawful but, given the preexisting law, the unlawfulness of the conduct must have been apparent. In determining whether an official is entitled to qualified immunity, this court asks whether the law was clearly established at the time of the alleged action.

Barton v. Norrod, 106 F.3d 1289, 1293 (6th Cir. 1997) (citation omitted). In determining whether the officers should have known in February 1994 that their actions

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DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (suggesting that non-textual constitutional claims would be better analyzed under the Privileges and Immunities Clause of the Fourteenth Amendment; "Familiarity breeds inattention; and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms – sort of like 'green pastel redness.'").

were unlawful, we look primarily to decisions of the Supreme Court, this court, and other courts within our circuit. *See Cagle v. Gilley,* 957 F.2d 1347, 1348 (6th Cir. 1992).

We review the district court's determination that the officers were entitled to qualified immunity *de novo. See Barton,* 106 F.3d at 1293. In the present case, the district court reviewed the relevant case law dealing with claims that state actors violated substantive due process by allowing individuals to become subject to an indirect harm, and found much of that law to be confused and in conflict. It then appeared to reason that, since the doctrine of substantive due process was unclear in its entirety, no such claim could ever survive a motion to dismiss on the ground of qualified immunity: "This inquiry shows that the law in this area is unclear and that not only would no reasonable police officer have known what duty was owed to the plaintiff under the facts alleged in this case, but even the Supreme Court is uncertain on the matter." *Chipman v. City of Florence,* 858 F. Supp. 87, 90 (E.D. Ky. 1994) (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.,* 489 U.S. 189, 199, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989)) (dismissing complaint); *see also Chipman,* 866 F. Supp. 332, 335 (E.D. Ky. 1994) (denying motion for reconsideration).

This was error. While, as we will see below, there is a good deal of uncertainty with regard to the precise contours of substantive due process, it does not follow that state actors are insulated from liability on all such claims, no matter what the underlying facts may be. The fact that the law may have been unclear, or even hotly disputed, at the margins does not afford state actors immunity from suit where their actions violate the heartland of the

constitutional guarantee, as that guarantee was understood at the time of the violation.[11] Stated differently, it is simply irrelevant that the definition of the right to substantive due process has been in flux if, under any definition found in the case law at the time, the defendants should have known in February 1994 that their actions violated that right.

B. Custody Establishes the Existence of a Duty

We therefore proceed to determine whether the individual officers violated law that was clearly established in February 1994 when they forced Black into Kritis's truck. When, as here, a plaintiff alleges that state actors violated substantive due process by placing her at risk of harm from a third party, the court is presented with two distinct, though interrelated inquiries. First, in order to find for the plaintiff, the court must conclude that the plaintiff and the state actors had a sufficiently direct relationship such that the defendants owed her a duty not to subject her to danger. Second, the court must also conclude that the officers were sufficiently culpable to be liable under a substantive due process theory.

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[11] An instructive parallel: the district court's theory is analogous to an attempt to strike down a statute as unconstitutionally vague on its face because the application of the statute is not clear at the margins. Such an attempt will be unavailing, since federal courts will consider a facial vagueness claim only if a statute is unconstitutionally vague in all possible applications. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982). Similarly, the mere fact that a state actor may be entitled to qualified immunity on some claims under a particular constitutional theory because the law is unclear in some respects does not imply that he will be immune from any and all suits arising under that theory.

With respect to the first question, while the state does not owe its citizens a constitutional duty to keep them from harm in all circumstances, it has been clearly established that such a duty will arise when the state has acted to deprive an individual of certain indicia of liberty:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) (citation omitted); *see also Youngberg v. Romeo*, 457 U.S. 307, 315-16, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982) (involuntarily committed mental patients have substantive due process right, analogous to Eighth Amendment right of prisoners, to protection from harm). In the present case, Black's complaint alleges – and the record evidence could reasonably be read to show – that the officers threatened to arrest her if she did not leave in Kritis's truck, and they physically lifted her out of Stemler's car and placed her in the truck against her will. In so doing, the officers took the "affirmative act of restraining [Black's] freedom to act on her [own] behalf," and consequently imposed upon themselves a duty to ensure that they were not placing her in

danger. Their actions were, in the words of *DeShaney,* a restraint on Black's personal liberty, not a failure to act on her behalf. *See also Collins v. City of Harker Heights,* 503 U.S. 115, 127, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992).

The defendants rely on *Foy v. City of Berea,* 58 F.3d 227 (6th Cir. 1995), to argue that they did not infringe Black's liberty. In *Foy,* the plaintiff had been drinking in a dormitory with his friends. After receiving a complaint, the police came to the dormitory and told them, "Get in your car and get out of here or somebody is getting arrested." Although the police had told them only to leave the premises, the plaintiff and his friends then decided to take a lengthy drive from Berea, Kentucky, to Crestline, Ohio. Forty-five minutes into that journey, the driver crashed the car, killing Foy. This court held that the defendant police officers had not violated Foy's right to substantive due process, since there was no restraint on his liberty that had caused him to keep driving. *Id.* at 230. The defendants also rely on *Walton v. City of Southfield,* 995 F.2d 1331 (6th Cir. 1993). In *Walton,* we held that police officers who had arrested the driver of a car, and who had abandoned in a nearby building the children (ages 15 and 2) who were the passengers of that car – but who had never taken the children into their custody – were entitled to qualified immunity from a substantive due process challenge.

Neither case is apposite. In the present case, Black was rendered unable to protect herself by virtue of both the threat of arrest and her physical placement in the truck by the officers. Unlike *Foy,* Black never had the opportunity to make a voluntary choice to continue driving with Kritis beyond the span of time that the police had in effect ordered her to do so; her fatal accident occurred

about five minutes after the truck left the police stop. Furthermore, unlike *Walton,* Black was in the custody of the defendant officers in the sense that they had affirmatively acted to deprive her of her liberty, rather than merely negligently refused to act to protect her. *See Walton,* 995 F.2d at 1336-37. In sum, neither *Foy* nor *Walton* did anything to alter the clear and simple rule that state actors owe a duty of care to those individuals of whom they deprive their liberty, and a reasonable jury could conclude that the officers had deprived Black of her liberty by placing her in the truck or by threatening her with an arrest that would have been unwarranted under Kentucky law. *See* Ky. Rev. Stat. § 222.202 (offense of public intoxication involves drinking in public or endangering one's self, other persons, or property).

While it is clear that the state owes a duty of care to an individual who has suffered a deprivation of liberty by the state – *e.g.,* an individual who has been in the state's custody – there is also dicta in *DeShaney* that suggests that the state may also owe a duty to individuals in non-custodial settings:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.

489 U.S. at 201. A number of courts have relied on this language to hold that the state may owe an individual a duty of care under substantive due process, even if the individual is not in the state's custody, if the state has created a risk of harm to the individual. *See Kneipp v. Tedder,* 95 F.3d 1199, 1206-09 (3d Cir. 1996) (collecting cases). Our court has suggested in dicta that *DeShaney*

stands for the proposition that "a duty to protect can arise in a noncustodial setting if the state does anything to render an individual more vulnerable to danger." *Gazette v. City of Pontiac,* 41 F.3d 1061, 1065 (6th Cir. 1994). The defendants argue that this rule was not clearly established in February of 1994, and remains unclear today. We need not opine as to the circumstances under which a substantive due process claim in a non-custodial setting is possible, or as to whether that possibility had been clearly established in 1994. Under any definition of the term, Black was in the defendant officers' custody at the time she was forced into Kritis's truck. Because we, unlike the district court, believe that any uncertainty at the margins of the *DeShaney* test is not relevant to Black's claim, we hold that the defendants should have known under clearly established law that they owed Black a duty not to force her into harm's way.

C. The Defendants Violated Their Duty to Black by Exhibiting Deliberate Indifference to Her Fate

Our holding that the officers owed Black a duty of care does not end our inquiry, for we also must determine what duty of care they owed, and whether they breached that duty. Over the last decade, the Supreme Court and this court have gradually defined the level of culpability with which a state defendant must act in order to be held liable for a violation of substantive due process. In *Daniels v. Williams,* 474 U.S. 327, 334 n.3, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986), the Supreme Court held that an allegation of simple negligence would not be sufficient to support a due process claim, but reserved judgment as to whether an allegation of gross negligence would suffice. In *Nishiyama v. Dickson County,* 814 F.2d 277 (6th Cir. 1987) (en banc),

this court answered that reserved question in the affirmative. In that case, the plaintiff had been killed by an inmate who stopped her by using a patrol car that he had been allowed to use by county officials despite repeated warnings. We held that the plaintiff had stated a substantive due process claim:

> The allegation in the present complaint of gross negligence on the part of the defendants was sufficient to charge them with arbitrary use of government power . . . . . [A] person may be said to act in such a way as to trigger a section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow.

Id. at 282.

This aspect of *Nishiyama* has since been further refined. In *Lewellen v. Metropolitan Gov't of Nashville & Davidson County,* 34 F.3d 345 (6th Cir. 1994) – a case decided after the defendant officers forced Black into Kritis's car – we held that, with respect to non-custodial cases, *Nishiyama* was no longer an accurate statement of the law after *DeShaney* and *Collins v. City of Harker Heights,* 503 U.S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). In holding that a school board's negligence in building a school too close to a power line was not actionable under § 1983, we set forth a new test: "What seems to be required is an intentional infliction of injury . . . or some other governmental action that is 'arbitrary in the constitutional sense.'" *Lewellen,* 34 F.3d at 351 (quoting *Collins,* 503 U.S. at 129); *see also Gazette,* 41 F.3d at 1067 (gross negligence is not actionable under substantive due

process). We also expressed doubt as to whether even deliberate indifference by state actors could give rise to a substantive due process claim by a plaintiff who was not in the custody of the state. *Lewellen,* 34 F.3d at 350 n.4.

Of course, the phrase "arbitrary in the constitutional sense" is not self-defining; indeed, in *Collins,* the only elucidation that the Supreme Court provided for that phrase was a reference to the old chestnut of substantive due process claims, "conscience shocking." 503 U.S. at 128. The defendants' argument is essentially that Black's claim fails the test of *Lewellen* and *Collins* because there is no law now, nor was there in 1994, clearly specifying any area of liability under substantive due process. In essence, they argue that there is no clearly established law holding that they have any duty to persons in their custody. As they conceded at oral argument, under their theory, they would not be liable even if they physically carried Black to the middle of a busy highway and left her there. However, *Collins* carefully noted that its holding was limited to those cases where a plaintiff was not in the custody of the state, and specifically reaffirmed the established law that the state is required to take care to protect persons in its custody from danger. *See Collins,* 503 U.S. at 127; *see also Lewellen,* 34 F.3d at 350 n.4. Since, as we have held above, viewing the facts in her favor, Black was in the defendants' custody at the time that they forced her into Kritis's truck, they owed her a duty not to endanger her safety.

In cases such as this one, where the plaintiff suffered injury as a result of being placed in the state's custody, it has consistently and uncontroversially been the rule that a constitutional claim arises where the injury occurred as a result of the state's deliberate indifference to the risk of such an injury. *See Farmer v. Brennan,* 511 U.S. 825, 834,

128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994); *Wilson v. Seiter,* 501 U.S. 294, 303, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (1991); *Estelle v. Gamble,* 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976). Although each of these cases involved an Eighth Amendment claim raised by a prisoner, we have consistently held that at least the same standard applies to substantive due process claims raised by other persons in the custody of the state. *See Durham v. Nu'Man,* 97 F.3d 862, 869 (6th Cir. 1996) (patient at state mental hospital), *cert. denied,* 137 L. Ed. 2d 496, 117 S. Ct. 1337 (1997); *Lintz v. Skipski,* 25 F.3d 304, 306 (6th Cir. 1994) (children in state foster home); *Heflin v. Stewart County,* 958 F.2d 709, 713-14 (6th Cir. 1992) (pretrial detainee); *Meador v. Cabinet of Human Resources,* 902 F.2d 474, 476 (6th Cir. 1990) (children in state foster home). While *Lewellen* may have declared that the range of culpable conduct is narrower in cases where the plaintiff is not in the state's custody, it did nothing to change the standard of deliberate indifference in cases involving a custodial relationship. *See Foy,* 58 F.3d at 232 (noting distinction). In cases in which a plaintiff alleges an injury arising out of the state's custody over her, the deliberate indifference test ensures that injuries arising out of truly arbitrary governmental action are compensated, while at the same time avoiding the imposition on to the states of a broad, federalized system of tort law. We therefore reaffirm the application of that test today.

We again note that the district court erred in holding that the entire field of substantive due process law regarding state liability for indirect injury was not clearly established in 1994. *See Chipman,* 858 F. Supp. at 90. Although the discussion above reveals that there is obviously considerable uncertainty at the margin, the core principle

that the state must not act with deliberate indifference to the risk of injury to persons in its custody is well-established. In the present case, we believe that Black's complaint, as well as the record evidence read in the light most favorable to her, supports a claim that the defendant officers acted with deliberate indifference to the threat of injury to her. They knew, or reasonably should have known, that Kritis was unfit to drive. They knew, or reasonably should have known, that Kritis had assaulted her earlier in the evening and had threatened to hurt her. Nevertheless, they chose to act affirmatively to place her in harm's way.

The very notion that police officers should not have known that they could not force an incapacitated woman to drive off with an obviously drunk man who they had reason to believe had beaten her betrays a chilling and unacceptable vision of the role of the police in our society. In short, these facts support a substantive due process claim under law that was clearly established in 1994, and we are therefore obliged to reverse the dismissal of her complaint against the individual officers.[12]

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[12] The defendants have argued that Black is precluded from relitigating the findings of the Boone County Circuit Court in her state-law civil suit. In awarding judgment to the defendant officers on Black's wrongful death claim, the state court held that none of the state actors were the direct cause of the accident on the highway. *Chipman v. City of Florence,* No. 94-CI-00202 slip op. at 4 (Boone Co., Ky., Cir. Ct. Apr. 2, 1996). While those findings are entitled to preclusive effect, they are irrelevant to the merits of her substantive due process claim.

IV. Stemler's Claims against the Individual Officers

We turn now to the merits of Stemler's claims against the individual officers. She has raised claims of false arrest and malicious prosecution against the officers. She also asserts that her arrest violated the Equal Protection Clause insofar as it was based either on her sex or on her supposed sexual orientation. We again review the law to determine whether the officers should have known in February 1994 that their actions were in violation of applicable federal constitutional or statutory guarantees.

A. False Arrest and Malicious Prosecution

As noted above, Stemler brought a suit against the defendants herein in the Boone County Circuit Court alleging various state-law theories. The state court awarded summary judgment to the defendants on April 2, 1996. The state court described the facts in relevant part as follows:

> Upon speaking to Stemler, Officer Wince noted the odor of alcohol, conducted field sobriety tests, administered a PBT test (which read .105), and obtained an admission from Stemler that she had consumed alcoholic beverages. Based upon the above, Officer Wince decided to arrest Stemler for DUI.

Stemler v. City of Florence, No. 94-CI-00459, slip op. at 2 (Boone Co., Ky., Cir. Ct. Apr. 2, 1996) (consolidated with *Chipman*). The court reasoned that the evidence established that there was probable cause to arrest her:

> There are no genuinely disputed material facts relating to the question of probable cause for the

> arrest of the Plaintiff, Stemler. Stemler stated at the scene that she had consumed alcohol, she had the smell of alcohol on her person, her performance on the field sobriety tests and her preliminary breath test result of .105 certainly constitutes [sic] probable cause.

Id. at 5. The state court then held that the existence of probable cause precluded both the false arrest claim and the malicious prosecution claim under Kentucky law.

Stemler is precluded from relitigating in this case the issue of whether there was probable cause to arrest her to the same extent that Kentucky would accord preclusive effect to the judgment against her in her state court civil suit. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 82, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984); *Allen v. McCurry*, 449 U.S. 90, 97, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980).[13] Under Kentucky law, "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Revenue Cabinet v. Samani*, 757 S.W.2d 199, 202 (Ky. Ct. App. 1988) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980)). The issue of probable

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[13] Stemler argues, without elaboration, that she did not receive a fair hearing in the state court in her state-law civil suit. However, a state court proceeding is accorded preclusive effect in a later § 1983 suit so long as it meets minimal standards of due process. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982); *Osborn v. Ashland Bd. of Alcohol, Drug Addiction & Mental Health Servs.*, 979 F.2d 1131, 1134 (6th Cir. 1992). Stemler does not identify any reason to believe that she suffered a deprivation of due process in the state court.

cause for Stemler's arrest was actually litigated and decided in the state court suit, and was necessary to the disposition of the case. Although Stemler's appeal is pending in that case, the pendency of an appeal does not destroy the finality of the judgment for the purposes of issue preclusion under Kentucky law. *See Roberts v. Wilcox,* 805 S.W.2d 152, 153 (Ky. Ct. App. 1991). Thus, this court is bound by the state court's determination that there was probable cause for Stemler's arrest.

The existence of probable cause for Stemler's arrest forecloses her false arrest claim. A plaintiff bringing a constitutional claim of false arrest under the Fourth Amendment must show that there was not probable cause for the arrest. *See Donovan v. Thames,* 105 F.3d 291, 298 (6th Cir. 1997) (applying Kentucky doctrine of collateral estoppel).[14] Likewise, the existence of probable cause would negate the possibility of liability under a state-law malicious prosecution theory, and therefore under a federal constitutional theory as well, at least to the extent that Stemler alleges that the defendants sought to prosecute her despite knowing that there was not probable cause to do so. *See Baker v. McCollan,* 443 U.S. 137, 145, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979); *Coogan v. City of Wixom,* 820 F.2d 170, 175 (6th Cir. 1987).

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[14] Because we affirm the dismissal of the false arrest claim on the ground of collateral estoppel, we do not address the reasoning of the district court, based on *Albright v. Oliver,* 510 U.S. 266, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994), that the right to be free from false arrest is not clearly established. On remand, if in the interim Stemler should secure a reversal on appeal of the judgment against her in her state-law suit, thereby destroying the collateral estoppel effect of that judgment, the district court should consider in the first instance whether Stemler's claim may proceed under the standard of qualified immunity that we have set out in this opinion.

Stemler, however, is not now asserting that sort of a malicious prosecution claim. Instead, she asserts that even if there were probable cause to prosecute her, Wince committed a constitutional tort by falsifying evidence against her. Under law that was clearly established in 1994, Wince would have violated Stemler's right to due process if he knowingly fabricated evidence against her, and if there is a reasonable likelihood that the false evidence could have affected the judgment of the jury. *See United States v. Lochmondy,* 890 F.2d 817, 822 (6th Cir. 1989); *see also Riley v. City of Montgomery,* 104 F.3d 1247, 1253 (11th Cir. 1997); *United States v. Epley,* 52 F.3d 571, 576 (6th Cir. 1995); *Grillo v. Coughlin,* 31 F.3d 53, 56 (2d Cir. 1994). A claim of fabrication of evidence does not require a conclusion that the state did not have probable cause to prosecute the claimant. The state court only found that there was probable cause to prosecute Stemler, and made no findings with regard to any claim of fabrication of evidence. Thus, since the state court in the civil suit made no findings on this issue, and the court in the state criminal case did not make any findings on this issue that were necessary to the final judgment (*i.e.,* Stemler's acquittal), she would not be estopped from pursuing this claim.

B. Failure to Plead an Evidence-Tampering Theory

However, Stemler did not allege this alternative theory in her complaint. The closest she comes to making such an allegation is at paragraph 48 of her amended complaint: "The Defendants, Officers Wince, Dolan, Dusing and City of Florence, instituted and continued the original criminal judicial proceeding against the Plaintiff by insisting upon her prosecution and conviction despite

their personal knowledge Plaintiff should not be so prosecuted." This allegation cannot fairly be read to give notice that she seeks to assert an evidence-tampering claim. The record reflects that the evidence-tampering claim first arose on May 7, 1996, in Stemler's response to the city's motion for summary judgment, after the individual officers were dismissed from the suit.

It is well-settled that the parties may constructively amend the complaint by agreeing, even implicitly, to litigate fully an issue not raised in the original pleadings. *See* 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1493 at 19 (2d ed. 1990). However, such a constructive amendment can have no effect upon a party who has been dismissed from the action, and who is not given notice that a new claim of liability has been asserted against him. Stemler, of course, was free to seek leave to amend her complaint again to raise her new theory of falsification of evidence, or to file a new complaint against Wince explicitly raising that claim. She did not do so. The district court did not err in dismissing Stemler's complaint by failing to consider a cause of action that she had not yet alleged. Consequently, this court is powerless to engage in any further review of her allegation that Wince falsified evidence against her in her criminal trial.

C. Equal Protection

The defendants also assert that Stemler is collaterally estopped from pursuing her equal protection claims. However, the determination of probable cause does not preclude a plaintiff from pursuing a claim that the state chose to prosecute her due to invidious discrimination. The

courts have long held that a selective enforcement claim may be available even where there is probable cause for prosecution. *See Wayte v. United States,* 470 U.S. 598, 607, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985); *Oyler v. Boles,* 368 U.S. 448, 455-56, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962). While we have held that the possibility of a discriminatory motive does not affect the inquiry into the objective reasonableness of an arrest for the purposes of the Fourth Amendment, *see United States v. Ferguson,* 8 F.3d 385, 391 (6th Cir. 1993) (en banc), that case did nothing to question the long-established availability of a separate selective enforcement claim under the Equal Protection Clause. The Supreme Court subsequently confirmed our interpretation of the Fourth Amendment, and at the same time even more explicitly re-confirmed the availability of an equal protection claim despite the existence of probable cause:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.

Whren v. United States, 517 U.S. 806, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996). Stemler is not collaterally estopped, and we therefore proceed to the merits of Stemler's equal protection claims.

In order to state a claim of selective prosecution, a plaintiff must demonstrate three elements:

> First, [the state actor] must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even

> though he has decided not to prosecute persons not belonging to that group in similar situations. Second, he must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the *group* which the defendant belongs to.

United States v. Anderson, 923 F.2d 450, 453 (6th Cir. 1991) (citing *Wayte,* 470 U.S. at 608 n.10 & 609). With regard to the first element, it is an absolute requirement that the plaintiff make at least a prima facie showing that similarly situated persons outside her category were not prosecuted. *See United States v. Armstrong,* 517 U.S. 456, 134 L. Ed. 2d 687, 116 S. Ct. 1480, 1487 (1996). Furthermore, there is a strong presumption that the state actors have properly discharged their official duties, and to overcome that presumption the plaintiff must present clear evidence to the contrary; "the standard is a demanding one." 116 S. Ct. at 1486.

We believe that this is the rare case in which a plaintiff has successfully stated a claim of selective prosecution. Stemler's complaint adequately alleges, and the record evidence supports a finding, that the defendant officers chose to arrest and prosecute her for driving under the influence because they perceived her to be a lesbian, and out of a desire to effectuate an animus against homosexuals. Each of the defendants was aware of Kritis's assertion that Stemler was a lesbian, and Dusing admitted that he relied on Kritis's version of the facts in deciding to arrest Stemler. Furthermore, the record supports a finding that Kritis was similarly situated to Stemler (or, indeed, far drunker than she), that the defendant officers perceived Kritis to be heterosexual, and that consequently they

chose not to arrest him at the same time that they arrested Stemler.

The defendants concede that Stemler's complaint alleges, and the record evidence could support a finding, that they decided to arrest and prosecute her because they perceived her to be a lesbian. They do not attempt to assert any justification whatsoever for this decision; instead they argue that as a blanket matter it is always constitutional to discriminate on the basis of sexual orientation, citing *Bowers v. Hardwick,* 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986). However, *Bowers* held only that there is no substantive due process right to engage in homosexual sodomy, and expressly declined to consider an equal protection claim. 478 U.S. at 196 n.8. It is inconceivable that *Bowers* stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation solely out of animus to that orientation: "'If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'" *Romer v. Evans,* 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620, 1627 (1996) (quoting *United States Dep't of Agric. v. Moreno,* 413 U.S. 528, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973)) (internal quotation and ellipses omitted). Stated differently, since governmental action "must bear a rational relationship to a legitimate governmental purpose," *Romer,* 116 S. Ct. at 1629, and the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, a state action based on that animus alone violates the Equal Protection Clause.

While this case, and *Romer,* involved animus related to sexual orientation, the principle involved in our case

really has nothing to do with that controversial area. *Moreno,* the case quoted in *Romer,* above, involved commune residents; the principle would be the same if Stemler had been arrested discriminatorily based on her hair color, her college bumper sticker (perhaps supporting an out-of-state rival) or her affiliation with a disfavored sorority or company.

It may be objected that *Romer* was not decided until after the defendants arrested and sought to prosecute Stemler allegedly for the sole reason of animus against her perceived sexual orientation. But it didn't take *Romer* to tell us that such arbitrary state action is contrary to the principle of equal protection of the laws.[15] It is a venerable rule under the Equal Protection Clause that the state may not choose to enforce even facially neutral laws differently against different portions of the citizenry solely out of an arbitrary desire to discriminate against one group. *See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 373, 30 L. Ed. 220, 6 S. Ct. 1064 (1886).

Furthermore, while a plaintiff in a selective-prosecution case must demonstrate that she was prosecuted because she was the member of some group, and not merely because the state actor prosecuted her out of purely personal animosity, *see Futernick v. Sumpter Twp.,* 78 F.3d 1051, 1057 (6th Cir.), *cert. denied,* 117 S. Ct. 296 (1996), the availability of such a claim has never been limited only to those groups accorded heightened scrutiny

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[15] We need not discuss whether any other aspect of *Romer*'s holding is sufficiently new that a state actor could not be expected to anticipate it. The core principle relevant in this case, that the state may not act solely out of the desire to harm an unpopular group, was clearly established by the case law in 1994.

under equal protection jurisprudence. *See id.* at 1056. Instead, a plaintiff makes out a selective-enforcement claim if she shows that the state based its enforcement decision on an "arbitrary classification," *Oyler v. Boles*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962), that is to say, a classification that gives rise to an inference that the state "intended to accomplish some forbidden aim" against that group through selective application of the laws. *Futernick*, 78 F.3d at 1056. A selective-enforcement claim such as this one is thus conceptually different from a claim that a statute violates equal protection; while almost every statute can be shown to have some conceivable rational basis, thereby surviving an equal protection challenge unless it is shown to discriminate against a group accorded heightened scrutiny, it will often be difficult to find a rational basis for a truly discriminatory application of a neutral law.

It is beyond cavil that Stemler has adequately alleged a selective-enforcement claim here. The record supports a finding that she was perceived to be a member of "an identifiable group," and that defendants sought to implement their animus against that group by arresting and seeking to prosecute her. The defendant officers are unable, and indeed have not even attempted, to demonstrate that there is any conceivable rational basis for a decision to enforce the drunk-driving laws against homosexuals but not against heterosexuals. The defendants can rely only on their assertion that discrimination on the basis of sexual orientation should be accorded no scrutiny whatsoever. We emphatically reject this assertion; the proposition that the state may constitutionally discriminate by enforcing laws only against homosexuals (or Centre College graduates or SAE members) is not now,

and never has been, the law. Under the facts as we are obligated to construe them, the defendants violated the core principle of the Equal Protection Clause by choosing to exercise the power of the state against Stemler solely for the reason that they disapproved of her perceived sexual orientation. Thus, the dismissal of her complaint must be reversed.

V. Conclusion

With respect to both plaintiffs, the district court's award of summary judgment to the municipal defendants and to the defendants in their official capacities is AFFIRMED. In No. 96-5996, the dismissal of Black's complaint against the individual officers is REVERSED. In No. 96-5993, the dismissal of Stemler's complaint against the individual officers is REVERSED with respect to her claim of denial of equal protection on the basis of sexual orientation; in all other respects, the judgment of the district court is AFFIRMED. Both cases are REMANDED to the district court for further proceedings consistent with this opinion.

CONCUR BY: HARRY W. WELLFORD

CONCUR: HARRY W. WELLFORD, Circuit Judge, concurring. I concur in part II dealing with a conclusion of no municipal liability and propriety of summary judgment for the City and the County in this case. As to part I, I do not necessarily subscribe to all of the findings made, particularly as to subparts B and D. I do not think it necessary to go into the detail recited by Judge Boggs to rule on the orders granting qualified immunity to the individual defendants.

I also concur in parts IV.A and IV.B that "probable cause for Stemler's arrest forecloses her false arrest claim" and that "probable cause would negate the possibility of liability under a state-law malicious prosecution theory," or a false arrest claim. Also, I concur in the conclusion that Stemler may not pursue further a claim that defendant Wince falsified evidence against her in her state criminal trial.

As to part III, the claim on behalf of the deceased Conni Black, I believe that the alleged conduct of the individual police officers supports reversal of their motions to dismiss. I do have reservations about concluding that deliberate indifference may have been averred as a matter of constitutional law, but I would agree with Judge Boggs to the extent he maintains that "the defendants should have known in February of 1994 that their [alleged] actions violated [Black's constitutional] right."

I would not cite *Nishiyama v. Dickson County,* 814 F.2d 277 (6th Cir. 1987) (en banc), as persuasive authority in this case. The individual defendants in that case had no direct relationship of any kind with the victim. Furthermore, I am doubtful about the continuing authority of *Nishiyama,* and I consider it settled in the Sixth Circuit that gross negligence alone may not subject a police officer to § 1983 liability absent a showing of willful disposition to harm or to deliberately ignore the plight of the victim in custody. *Lewellen v. Metropolitan Gov't of Nashville & Davidson County,* 34 F.3d 345, 351 (6th Cir. 1994).

Lewellen also holds that liability of a state actor may arise from some "action that is 'arbitrary in the constitutional sense.'" This is a *higher standard* than gross negligence. *Lewellen* requires some designed and intentional

activity on the part of the state actor to harm or punish someone. *Id.* And in this case, there was a sufficient allegation of arbitrary conduct on the part of some defendants intentionally designed to injure or punish Conni Black. I would hold simply that Black's estate has alleged sufficient facts to survive a motion to dismiss and that we should therefore reverse the contrary holding of the district court and remand for further consideration of the existence and proof of a constitutional tort. To put it another way, the alleged conduct of certain individual defendants may have been sufficiently shocking to the conscience that the Black claim should not have been dismissed against those defendants. *See Collins v. City of Harker Heights,* 503 U.S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). I am, however, particularly reluctant to expand upon the "highly elastic notion of substantive due process." *Lewellen,* 34 F.3d at 351.

I wholeheartedly agree with Judge Boggs' conclusion that "under any definition of the term, Black was in the defendant officer's custody at the time she was forced into Kritis' truck." The district court erred, in my view, in holding that Black, "who was very intoxicated . . . was not taken into custody in the ordinary sense." I believe there is adequate averment and showing that Black was effectually taken into custody. The district court therefore erred, I believe, in granting motions to dismiss as to the individual defendants.

I next address part IV.C, Stemler's remaining claims against the individual officers based upon an alleged equal protection violation, which Judge Boggs characterizes as alleged selective prosecution. I cannot equate an alleged animus against Stemler because of a perception about her sexual proclivities with discrimination based upon race,

sex, national origin, or the like.[1] There may be enough basis in Stemler's claim that some individual defendants based their law enforcement actions on some arbitrary and capricious classification or selectively enforced the laws on drunken driving, public intoxication, or public endangerment to warrant our reversing the dismissal of this claim. However, I do not reach the categorical decision of Judge Boggs that disapproval of Stemler's perceived sexual orientation was the sole, or even a significant, basis for her arrest by the defendants, and that this action therefore violated the equal protection clause.

The district court, upon remand, must also determine the effect, if any, on the federal claims asserted in this case of any future decision of the Kentucky Court of Appeals concerning the individual claims of Stemler and on behalf of Black. There is also the question whether plaintiffs impermissibly split their causes of action in these cases. They could have filed the § 1983 actions in state court. *See Kabealo v. Davis,* 829 F. Supp. 923, 928 (S.D. Ohio 1993) (splitting state claims from federal claims "would result in a needless duplication of expense and judicial resources"); *Administaff, Inc. v. Kaster,* 799 F. Supp. 685, 690 (W.D. Tex. 1992) ("Federal and state claims 'inexorably tied together' are best left together").

I would affirm the decision of the district court as to the municipal defendants, and as to defendants in their official capacities. I would affirm dismissal of Stemler's

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[1] I believe *Romer v. Evans,* 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996), simply holds that a statute purporting to deprive homosexuals of any special protections under state law has no rational relation to legitimate state government purposes. Furthermore, *Romer* was decided long after these defendants acted in this case.

claims of false arrest, malicious prosecution, and evidence falsification. I would **REVERSE** and **REMAND** for further proceedings and consideration of alleged federal constitutional torts in light of the decision set out herein, and in light of the Kentucky appellate decision on the remaining claims.[2]

[2] I also note the death of the Boone County Sheriff.